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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 476

UNITED STATES OF AMERICA, APPELLANT

v.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY ET AL.

No. 477

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion in the district court (R. 408–411) is unreported. It is a brief memorandum opinion filed September 9, 1935, adopting the reasoning and conclusions of the master contained in his first

report filed May 31, 1933 (R. 262–392). No later opinion was filed.

JURISDICTION

This is an appeal under the Act of May 22, 1936, c. 444, 49 Stat. 1369 (App. 156), which provided for direct appeal from decisions of the district court in this case.

The suit was begun by the United States July 31, 1930, in the District Court for the Eastern District of Washington, Northern Division (R. 1), pursuant to the requirements of the Act of June 25, 1929 (c. 41, 46 Stat. 41, App. 148), which provided for a general determination and accounting between the United States and the Northern Pacific Railroad Company and the Northern Pacific Railway Company (which are referred to in this brief as "the company") of the rights and liabilities arising under the land grant Act of July 2, 1864, and the Resolution of May 31, 1870, or any other acts of Congress supplemental or relating thereto (R. 1–83).

On July 18, 1931 (R. 154) the railway company filed an answer concluding with a prayer for a decree in favor of this defendant against the United States for compensation under the Act of June 25, 1929 (R. 248).

This answer contained motions to strike out certain of the subdivisions of the bill of complaint and pleaded affirmatively laches, *res judicata*, estoppel, waiver, and acquiescence.

The court appointed a master to hear these matters (R. 259–261).

After hearing, the master made his first report on May 31, 1933 (R. 262–390).

On October 3, 1935, the court entered an order adopting this report (R. 411–412). This order was amended on January 29, 1936, so as to reserve defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company as trustee and City Bank Farmers Trust Company as trustee (R. 418).

On April 21, 1936, the court entered an order, directing the master to take evidence relative to all matters not covered by his first report, except evidence as to the values of the land in controversy and the amount of compensation due to the plaintiff or to any of the defendants (R. 420).

The Act of May 22, 1936, c. 444, 49 Stat. 1369, App. 156, provides that in this case, described by its number in the district court as E–4389, "a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken

within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect."

On July 26, 1937, the master filed his second report (R. 421–533).

On March 22, 1938, the court entered an order on the exceptions to the master's report (R. 577).

On June 27, 1939, the court filed findings of fact and conclusions of law (R. 602–638) and on the same day entered its decree (R. 639–647). Within sixty days thereafter the United States and the defendants filed and perfected their respective appeals directly to the Supreme Court (R. 650–662).

QUESTIONS PRESENTED

1. Whether the company can maintain a claim for compensation for loss of indemnity selections, based solely on a false classification of lands as mineral, procured through its own fraud and corruption.

2. Whether the United States is estopped to show that the Act of July 2, 1864, on which the company bases its claim to indemnity selection rights, became null and void for the company's failure to obtain the required bona fide subscriptions to its stock and payments thereon.

3. Whether the words "agricultural lands" as used in the Act of July 2, 1864, meant agricultural lands in the common sense, or any nonmineral lands.

4. Whether the company can maintain a claim for compensation for loss of indemnity selections without having performed the condition expressed in the Act of July 2, 1864, requiring it to complete the whole road.

5. Whether the company is entitled to a credit in this accounting for 1,400,000 acres opposite about 82 miles of railroad added by a route unnecessarily circuitous and not the most eligible route as required by the Act of July 2, 1864.

6. Whether the United States was barred from certain of its defenses against the company's claim for compensation because of *res judicata,* estoppel, acquiescence or waiver.

7. Whether the company, without showing that it would or could have selected and obtained all of the lands upon which compensation is based, can maintain its claim to compensation for all of such lands.

8. Whether the lands outside the right of way which were within Indian reservations by virtue of the treaties of 1851 and 1855, were granted to the company notwithstanding those reservations.

9. Whether the lands in the Crow Reservation as defined by the Treaty of May 7, 1868, were losses from the grant occurring subsequent to July

2, 1864, notwithstanding the fact that those lands were within the reservation of 1851.

10. Whether the Act of June 25, 1929, authorized a credit to the company in this accounting for lands in the Northern Cheyenne Indian Reservation.

11. Whether unsurveyed lands should not be considered in determining the amount of land available for indemnity selection by the company.

12. Whether the land restored to the public domain and land surveyed after the withdrawals for forest reserves should not be considered in determining the amount of land available for selection within the second indemnity limits in Idaho.

13. Whether, under the Act of June 25, 1929, the company was entitled to compensation for the loss of lands in indemnity limits on which homesteaders had filed before June 5, 1924, and for which they had received patents thereafter.

14. Whether the company should have been required to account for the values it derived from lands mistakenly withdrawn from the public lands for its benefit between 1870 and 1890 upon the company's filing of general route maps and maps of definite location, and for profits received from the sale of land which, under the Act of July 2, 1864, it was required to open to settlers at $2.50 per acre.

15. Whether the company was entitled to compensation on account of lands asserted by the company to be within second indemnity limits opposite

the road between Portland, Oregon, and Tacoma, Washington.

STATUTES INVOLVED

The relevant portions of the statutes involved are set out in the appendix (cited hereinafter as App.) of this brief (pp. 35 to 156). The basic statutes are:

The Northern Pacific land grant Act of July 2, 1864, c. CCXVII, 13 Stat. 365 (App. 35–51), supplemented by the Joint Resolutions of April 10, 1869, c. 20, 16 Stat. 57 (App. 56) and May 31, 1870, c. 67, 16 Stat. 378 (App. 57).

The Mineral Classification Act of February 26, 1895, c. 131, 28 Stat. 683 (App. 95).

The Amending, Forfeiture and Adjustment Act of June 25, 1929, c. 41, 46 Stat. 41 (App. 148).

STATEMENT

Forest reserves.—The Act of July 2, 1864 which incorporated the Northern Pacific Railroad Company and the Resolution of May 31, 1870, defined areas from which the company might select lands as indemnity in lieu of lands within the primary grant made to the company under the Act and Resolution, commonly known as the place lands.

When Congress adopted the policy of keeping large areas of the public lands for forest reserves, it became necessary to withdraw such lands from settlement and entry. Portions of these lands were within the area defined as indemnity limits by the

Act and by the Resolution. The withdrawals, as far as they included the indemnity lands, were made chiefly between March 1, 1898, and March 2, 1907 (R. 607–615). It was known then that no title to indemnity lands vested in the company before selection, that the company in the elapsed thirty-three years or more had not selected from these unpatented lands in the indemnity limits, that most of them were not agricultural lands, and that the company had done nothing to complete the whole railroad since 1887. Accordingly it was believed that the United States rightfully could retain unselected indemnity lands.

In 1921, this Court decided on the facts before it, in *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, that this could be done only if the withdrawals left in the indemnity limits a sufficient amount of land to satisfy whatever selection rights the company might have. The case was remanded to ascertain the facts. It proceeded no further (R. 511–512, 174) and no judgment was entered. Efforts to adjust the grant on the basis of this decision resulted in a committee investigation in Congress pursuant to the Joint Resolution of June 5, 1924, c. 267, 43 Stat. 461 (App. 138). This brought to light the matters complained of in this suit, some of them for the first time, and led to the Act of June 25, 1929.

The Act of June 25, 1929, c. 41, 46 Stat. 41 (App. 148), under which this suit is brought, is by

its title an Act "To alter and amend" the Act of July 2, 1864, and the Resolution of May 31, 1870, "to declare forfeited to the United States certain claimed rights asserted" by the company, "to direct the institution and prosecution of proceedings looking to the adjustment of the grant" and for other purposes.

Section 1 retains for the United States, free of any claims, and removes from the grant, any lands within indemnity limits, which on June 5, 1924, were within the exterior boundaries of any national forest or other Government reservation and which on the dates of withdrawals for governmental purposes would be or were available to the company by indemnity selection or otherwise in satisfaction of any deficiency. It provides that the company shall have such compensation, if any, as the courts hold due.

Section 2 forfeits to the United States any selection rights, if any exist, claimed by the company.

Section 3 continues the reserved right to amend and repeal and disclaims any intention to depart from the original policy "relative to the disposition of granted lands by said grantee."

Section 4 excludes from the forfeiture right-of-way lands and those used in good-faith operation.

Section 5 directs the Attorney General to bring suit (1) to remove the cloud of any claims of the company, (2) to determine all controversies, (3) to have a full accounting to determine what more the

company may be entitled to and what the United States may be entitled to recover, (4) to find and determine the extent of performance by the United States and by the company of the terms, conditions, and convenants expressed or implied of the granting acts, and what lands, if any, have been patented or certified as a result of fraud, mistake of law or fact, or legislative or administrative misapprehension and (5) to determine all questions of law and fact germane to a complete adjudication under the granting acts and all other questions of law and fact presented to the joint Congressional committee.

Section 6 establishes broadly the law governing the accounting to be made and provides that the court shall determine the full value of the interest which may be rightfully claimed by the company in the lands under the grants and shall determine what quantities in lands or values the company has received in excess of the full amounts it was entitled to receive, either as a result of breaches by the company of the terms, conditions, or covenants, either expressed or implied of the granting Acts, or through mistake of law or fact, or through misapprehension as to the proper construction of the grants, or as a result of fraud, or otherwise, and that said excess lands and values, if any, shall be charged against the company in the judgments and decrees of the court.

The basic land grant.—The Act of July 2, 1864, c. CCXVII, 13 Stat. 365 (App. 35–51), was the

Act which created the Northern Pacific Railroad Company as a corporation and made the original grant to it.

Section 1 authorized the company to construct a **continuous railroad** by the **most eligible railroad route** as determined by it from Lake Superior to Puget Sound with a branch via the valley of the Columbia River to a point at or near Portland, Oregon.

Section 2 granted a right-of-way and required the United States to extinguish the Indian titles to all lands "falling under the operation of this Act, and acquired in the donation to the [road]."

Section 3 granted on each side of each mile of the road, 20 alternate sections in territories and 10 in states, of **public land** not mineral, whenever the United States have **full title, not reserved, sold, granted, or otherwise appropriated and free from preemption, or other claims or rights** at the time the line is definitely fixed and a plat filed. In lieu of excepted nonmineral lands, the company could select **other lands** within a ten-mile limit on either side. In lieu of mineral lands, the company could select **agricultural lands** "nearest to the line of said road, and within fifty miles thereof." This fifty mile limit failed to get into 13 Stat. 368 (R. 476).

Section 4 provided that patents should issue as each 25 miles was constructed and approved by commissioners appointed by the President.

Section 8 subjected the grant to the condition that within the time stated the company should **complete the whole road.**

Section 19 provided that unless the company shall obtain **bona fide subscriptions** to the stock of said company to the amount of two millions of dollars, with **ten per centum** paid within two years, the act shall be **null and void.**

Section 20 reserved rights to alter, amend, or repeal.

By subsequent resolutions (App. 53–55) the time for completion was extended to July 4, 1879 (R. 12, 22, 264) and a mortgage upon the railroad and telegraph line, prohibited by section 10 of the original Act, was authorized.

A Resolution of April 10, 1869, c. 20, 16 Stat. 57 (App. 56), authorized an extension of the branch from at or near Portland to Puget Sound and a connection with the main line; but provided that there should be no land subsidy outside the right-of-way so authorized.

The Resolution of May 31, 1870, c. 67, 16 Stat. 378 (App. 57), authorized the company to mortgage all its property and franchise "and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main

trunk line across the Cascade Mountains to Puget Sound."

This Resolution provided that in case, in any particular State or Territory, there was not at the time of final location "the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter," second indemnity limits might be established within ten miles on each side of the road, beyond the limits prescribed in the charter. This second indemnity was confined to selections within the State or Territory where the loss occurred and its total amount in such State or Territory was limited to an amount equal to the lands within that State or Territory "that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four."

This Resolution also provided "that all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

Organization and construction—1864 to 1887.—The Northern Pacific Railroad corporation organized as such in 1864 and on December 29, 1864, filed its acceptance of the act with the President.

In the same year (R. 8) a few of the incorporators pretended to subscribe for 20,075 shares of the stock of the corporation and pretended to pay thereon into the treasury of the corporation $10 per share.

On January 16, 1866, an assessment of 90% on all these shares was levied and on February 2, 1870, as the assessment was unpaid, the board of directors declared these shares forfeited (R. 8).

No bona fide subscriptions were made for two million dollars of the capital stock, with 10% paid thereon within two years after the passage and approval of the act (R. 8). There was never a payment of $10 per share on the 20,075 shares or any part thereof into the treasury of the company, but the subscribers only pretended to have paid $10 per share on the stock subscribed for. This pretended payment was a sham and a fraud against the corporation and against the United States and constituted a breach of the contract between the company and the United States (R. 8). These facts are alleged in subdivision VI of the complaint. On the application of the defendants the court dismissed this subdivision without hearing the plaintiff's evidence (R. 412). [Argued as point 2.]

The construction of the railroad was begun on February 15, 1870 (R. 267).

The original act had provided that it should extend from Lake Superior by the most eligible rail-

road route to Puget Sound with a branch via the valley of the Columbia River to a point at or near Portland, Oregon. There was no provision in it for a railroad from Portland to Puget Sound.

The Resolution of April 10, 1869, c. 20, 16 Stat. 57 (App. 56), authorized the company to extend its branch line from at or near Portland to Puget Sound and to connect that branch with the main line. It provided that the company should not be entitled to any additional land subsidy for this extension of the branch except such lands as might be included in the right-of-way. Thus, the company was authorized to build its main line directly to Puget Sound and its branch line from the main line via the valley of the Columbia River at or near Portland, thence to Puget Sound. This was the state of authorization when the construction of the railroad was begun.

The Resolution of May 31, 1870, c. 67, 16 Stat. 378, interchanged the main line and the branch as it had been extended by the Resolution of April 10, 1869, so that the main line was to be constructed via the valley of the Columbia River to Puget Sound and its branch across the Cascade Mountains from the main line to Puget Sound. Most of the general route is shown in an adaptation of defendants' Exhibit No. 131, appearing at the beginning of the appendix to this brief.

On July 30, 1870, the company filed with the Secretary of the Interior two separate maps of

general route, one showing the route from a point in the State of Wisconsin to the mouth of the Walla Walla River in Washington and the other from that point down the valley of the Columbia River to Portland, and thence to Puget Sound (R. 50).

On February 16, 1872, the company filed an amended map of general route extending from a point in the Territory of Dakota in a different line to the mouth of the Walla Walla river, thence as in the first map, down the valley of the Columbia river to a point at or near Portland and thence northerly to Puget Sound (R. 50).

The company constructed the main line from Lake Superior via the valley of the Columbia river as far as Wallula, a point about 225 miles short of Portland (R. 593). It has never completed the main line (R. 23, 52, Ans. R. 191, 220). [Argued as point 4.]

A branch line was built between Pasco, Washington, and Tacoma, making a junction at Pasco with the main line from Lake Superior to Wallula (R. 54). The combination of the main line from Lake Superior as far as Pasco with the branch from Pasco to Tacoma gave through rails to Puget Sound by a route some eighty-two miles longer than the route alleged in the complaint to be a more eligible route (R. 55). [Argued as point 5.]

The main line from Spokane Falls to Wallula was completed in 1881 (R. 323). The railroad be-

tween Tacoma and Portland was completed in 1883 (R. 616). The branch line from Pasco to Tacoma was completed in 1887 (R. 323).

The fraudulent mineral classification.—The Act of July 2, 1864, excluded mineral lands from the grant and provided for the selection of agricultural lands in lieu thereof but made no express provision for the determination of what lands were mineral. The Act of February 26, 1895, c. 131, 28 Stat. 683, provided that this fact should be determined by a classification by commissioners appointed by the President which, when approved by the Secretary of the Interior, should be considered final except in case of fraud. Such a classification was made. As alleged in subdivision XXVIII of the complaint (R. 60–65) the company, by conduct which the master found to be a fraud in fact upon the United States (R. 345), procured the classification of approximately 3,782,377.90 acres of place lands of little value as mineral, without regard to whether they were, in fact, mineral or nonmineral (R. 61). On this the company has relied as the only base for its claim of right to make selection of more than one million acres within the forest reserves and other reserves of the United States (N. P. Ex. E, R. 777–778). The district court dismissed this subdivision of the complaint (R. 412). Argued as point 1.

Agricultural lands.—In the area of public lands retained by the United States for forest reserves by withdrawals made between 1898 and 1907 were many acres which were not agricultural lands in the common sense. The company's claim for compensation is based upon alleged loss of the opportunity to select indemnity lands from these areas. To the extent of more than a million acres this claim is based on the fraudulent classification as mineral of the 3,782,377.90 acres referred to above. By the terms of the Act of July 2, 1864, any selection of indemnity lands on the basis of mineral losses is confined to "unoccupied and unappropriated agricultural lands." The court (R. 625) has adopted the ruling of the master that the word "agricultural" in the Act does not mean agricultural in the common sense but means only nonmineral (R. 523, 451). [Argued as point 3.]

Statutes of limitation, res judicata, laches, estoppel, acquiescence, and waiver.—The defendants by their answers claim that the United States is barred from objecting to the defendants' prayer for compensation (R. 248) on the grounds set out under points 1, 2, 4, 5, 8, and 9 of this brief, because of *res judicata,* laches, estoppel, acquiescence, and waiver. [Argued as point 6.]

Indian reservations.—Subdivision XXIX of the complaint alleges (1) that some of the lands within the place limits, defined by the Act of July 2, 1864,

had theretofore been reserved to certain Indians by treaties of September 17, 1851, and October 17, 1855, and were therefore erroneously patented to the company, and (2) that losses to the grant within a portion of this reservation as reduced by the subsequent treaty of May 7, 1868, were erroneously treated as proper base for lands patented to the company in the second indemnity limits of Montana (R. 66–70). The district court dismissed this subdivision and therefore did not charge the company in the accounting with the lands thus improperly received (R. 412). [Argued as points 8 and 9.] The company has also been awarded compensation for 32,483.92 acres of land in the Northern Cheyenne Indian Reservation in Montana (R. 628, 468, 524; Gov't Ex. 146, R. 608; N. P. Ex. F, R. 778). [Argued as point 10.]

Probable entries by settlers and others ignored.—The award to the company for compensation for 1,453,061.02 acres has been made as if the company owned them. It is probable that if such lands had not been retained in the reserves, many of the more valuable of these acres, inasmuch as they were available for settlement, would have been taken by settlers and others and that the company could not have obtained them. [Argued as point 7.]

Unsurveyed lands.—These lands, vast in area, were available for selection as indemnity lands as soon as surveyed at the company's expense. They have been ignored in deciding whether at the time

when indemnity lands were designated for the reserves, enough land remained to meet the company's selection claims. [Argued as point 11.]

Land subsequently surveyed and land returned to the public domain, after withdrawals.—Such lands also have been ignored in deciding that the withdrawals were invalid. [Argued as point 12.]

Lands within the indemnity limits withdrawn for reserves which had been entered by homesteaders.—These lands, entered before June 5, 1924, and subsequently patented to the homesteaders, have been included as losses to the company in awarding compensation. [Argued as point 13.]

Unlawful profits to the company.—These have resulted from unlawful withdrawals for its benefit, from preemption and homestead settlement, and profits from the breach of its obligation to permit preemption and settlement at $2.50 an acre. They have been ignored in the accounting. [Argued as point 14.]

Compensation for 196,761.66 acres in second indemnity limits in Washington.—This was sought by the company but was denied by the court on the ground that the withdrawal created no deficiency in Washington because the company was not entitled to indemnity acres in lieu of those which actually it had obtained in the area of the Tacoma overlap. It will be argued for the United States that this was right and that the denial is supportable on two additional grounds not approved by the

court. One is that second indemnity was never granted for the line between Tacoma and Portland. The other is that this line has turned out to be a branch only and so by Resolution of April 10, 1869, the company is expressly denied any indemnity right. [Argued as point 15.]

Substantial effect of the questions presented by this appeal

The progress of the suit in the district court up to the entry, on June 27, 1939, of the decree appealed from is outlined in the statement of jurisdiction, *supra*, p. 2.

The decree quiets title to the lands from the indemnity belts retained by the United States in the forest reserves and other reserves and directs the issuance of patents to the company for 428,986.68 acres (R. 643), mostly in place limits of the grants. In these and several other respects the decree is not the subject of this appeal.

The main questions presented by the appeal relate to the award of compensation to the company for 1,453,061.02 acres (R. 642) held mainly by the United States in the forest reserves and in other government reservations. If the award should be sustained, the value of these lands and consequently the ultimate amount of the compensation would require determination in further proceedings.

Of the fifteen points urged by the United States on this appeal, thirteen constitute separate attacks upon the correctness of the award, one, point 6, asserts that the defenses, rejected by the court below, are not barred by any statute of limitations, or by *res judicata*, laches, estoppel, acquiescence, or waiver, and one, point 15, is in answer to the company's appeal in No. 477.

Of the thirteen points affirmatively urged, each, if sustained, would affect the award independently of the others in the manner and to the extent here briefly summarized.

Point 1 attacks the award on the ground that, to the extent of more than 1,000,000 acres, it rests solely upon a fraudulent classification of lands as mineral which is ineffective to support indemnity selection rights.

Points 2 and 4 attack the award as a whole on the ground that the company has no right whatever to compensation because of its failure to perform conditions which, under the basic grant, are essential prerequisites to any indemnity selection rights.

Point 3 attacks the award on the ground that, to the extent of more than 1,000,000 acres, it awards compensation for lands which, because they were not "agricultural lands," were not eligible for selection in lieu of mineral lands.

Point 5 attacks the award on the ground that it fails to charge against the company in the account-

ing approximately 1,400,000 acres it received improperly as a result of building its line, contrary to the requirements of the granting act, along an unnecessarily circuitous route.

Point 7 attacks the award as a whole on the ground that the company has not shown, and cannot show, as to all of the lands for which compensation was awarded, that if they had not been withdrawn for reserves it would have acquired them, or could have acquired them, by indemnity selection in competition with homesteaders and others to whom they would have been at least equally available.

Point 8 attacks the award as a whole on the ground that it fails to charge the company with approximately 13,300,000 acres within Indian reservations which it has received but to which it was not entitled, and which, at the lowest, exceeded by 2,800,000 acres all that it could have obtained by indemnity selection. If charged against the company, this excess would more than offset the acreage awarded.

Point 9 attacks the correctness of the award on the ground that it fails to charge the company with 1,198,813.10 acres which it received as indemnity in the second indemnity belt in Montana, in excess of the area which it was entitled to receive in that belt and on the further ground that it includes

compensation for an additional 170,326.37 acres in such belt to which it is not entitled.

Point 10 attacks the correctness of the award on the ground that it includes compensation for 32,483.92 acres in the Northern Cheyenne Indian Reservation which were not within the description of lands for which compensation was authorized.

Point 11 attacks the award as a whole on the ground that it fails to take into consideration a vast acreage of unsurveyed lands in the indemnity limits which are available to satisfy selection rights and which, upon survey and determination of their amount, may well be sufficient to eliminate all deficiencies in the amount of land available for indemnity selection and thereby to eliminate all basis for compensation.

Point 12 attacks the award as a whole on the ground that it fails to take into consideration lands which, after the date of withdrawals for forest reserves, were made available for indemnity selection either by restoration to the public-domain or by survey. The amount of such lands, which is not apparent on this record, may well be sufficient to eliminate all deficiencies in the amount of land available for indemnity selection and thereby to eliminate all basis for compensation.

Point 13 attacks the award on the ground that, to the extent of 2,480.91 acres, it includes lands not

properly compensable because, having been entered by homesteaders before June 5, 1924, they were not within the description of lands for which compensation was authorized.

Point 14 attacks the award as a whole on the ground that it fails to charge the company with values it derived from a vast quantity of lands unlawfully withheld for the company's benefit when it was required by law to remain open to settlement and entry, and on the ground that it failed to charge the company with vast profits which it received from the sale, at its own price, of lands which it was required, under the grant, to make available to settlers at $2.50 per acre.

SPECIFICATIONS OF ERROR TO BE URGED

The district court erred, it is submitted, in ruling against the United States on the definite points in the statement filed herein on November 4, 1939 (R. 838–840) as follows:

1. The awards to the defendants are based in large part upon classifications of mineral and nonmineral lands which were a pretense and untrue, to the injury of the United States, procured by the defendants by the practice of fraud and corruption on the commissioners making the pretended classifications and by concealing from the Secretary of the Interior the known falsity of the reports of the commissioners; and without these vicious classifications no basis has been shown for a mineral and

nonmineral determination without which the Railway Company never showed the existence of the conditions on which the United States had agreed to let the Railroad Company have these indemnity lands and without this, these awards could not be made.

2. The Act of July 2, 1864, 13 Stat. 365, became void on July 3, 1866, and so remained by section 19 thereof because the Northern Pacific Railroad Company did not obtain bona fide subscriptions to the stock of said company to the amount of two million dollars with ten per centum paid in, within two years after the passage and approval of the act.

3. "Agricultural lands" in section 3 of this act meant agricultural lands and not any other nonmineral lands; and the awards to the defendants have been made erroneously to the contrary.

4. The railroad contemplated by the act has never been completed in substance; and the time therefor has long since expired; and such completion was by the express words of section 8 of the act a condition to the right to any of the indemnity lands, and, therefore, at the time the indemnity lands were withdrawn the Railway Company had no right to compel the United States to convey them and these withdrawals were and are valid.

5. The awards to the defendants erroneously include credits for 1,400,000 additional acres because the Railroad Company constructed by an unnecessarily circuitous route in Washington and not by the most eligible route from Lake Superior to Puget Sound as required by the Act of July 2, 1864.

6. The United States is not barred from any of its submissions by statutes of limitations, *res adju-*

dicata, laches, estoppel, acquiescence, waiver or otherwise.

The decree of June 27, 1939, is in error in the accounting balance for its mistreatment of submissions 1 to 6, *supra,* and for additional reasons going to parts of the award in the particulars following, namely:

7. The Railway Company is not entitled to compensation for the 1,453,061 acres described in the decree because it has not shown that it would have selected and obtained all the lands in the forest reserve if they had not been withdrawn and it has greatly profited by the mistakes made as to the withdrawals of lands under the Act of July 2, 1864, and these facts were disregarded erroneously in arriving at the rights defined by the decree of June 27, 1939.

8. The lands in the Indian reservations, by the Treaties of 1851 and 1855, outside the right-of-way, were not granted to the Northern Pacific Railroad Company and they should have been charged to the Railway Company in the accounting to the extent of the excess of them over obtainable indemnity lands.

9. It was error in the District Court to rule that lands located within the Crow Indian Reservation as defined by the Treaty of May 7, 1868, were losses subsequent to July 2, 1864, from the place lands and, therefore, to award to the defendants compensation on account of lands in the second indemnity limits in Montana and not to charge the defendants with additional lands heretofore received by the defendants within these second indemnity limits.

10. The Act of June 25, 1929, did not authorize the making of a credit to the Railway Company in

the accounting for the lands in the Northern Cheyenne Indian Reservation.

11. The District Court erred in disregarding the unsurveyed public lands remaining in the indemnity limits after withdrawals for Government purposes in determining whether or not those withdrawals were valid.

12. In determining the question of the validity of the withdrawals for Government purposes of lands in the second indemnity belt in Idaho the District Court erred in disregarding subsequent restorations to the public domain and subsequent surveys within those indemnity limits which increased the area of public lands in the limits to such an extent that it exceeded the area of the unsatisfied losses in Idaho satisfiable in such limits.

13. It was error in the district court to award compensation on account of lands withdrawn within the indemnity limits, on which homesteaders filed prior to June 5, 1924, and received patents thereafter.

14. It was error in the district court to strike out subdivisions VII, VIII, XIII, and XXXII of the bill, and, thereby, to deprive the United States of an accounting of the profits received by the Northern Pacific Railroad Company in the sale of lands which should have been opened to settlers at $2.50 an acre, and therefore received as profits from its violation of its contractual obligations to the United States under the Act of July 2, 1864, and to ignore the values derived by the company from mistakes in erroneous withdrawals between 1870 and 1890, on the filing of general route maps and maps of definite location.

15. The Joint Resolution of May 31, 1870, did not authorize the establishment of second indemnity

limits opposite the railroad between Portland, Oregon, and Tacoma, Washington, and this is an additional ground, ruled against in the district court, which supports the action of the district court in denying the Railway Company's claim to compensation on account of lands in such second indemnity limits in the State of Washington.

These points are discussed under their respective numbers in the summary immediately following.

SUMMARY OF ARGUMENT

1. *Fraudulent mineral classification.*—The company affirmatively asks compensation under the Act of June 25, 1929 (R. 248), for lands in indemnity limits withdrawn into the forest reserves and other reserves and has been awarded such compensation for 1,453,061.02 acres (R. 642). For 1,000,000 of these acres (R. 778, N. P. Ex. E) the company's claim is based solely upon an asserted right to select that number of acres from indemnity limits in lieu of mineral lands in the place limits, mineral lands having been excepted from the grant. To sustain that claim, the company was required to show that the place lands on which the right of selection is based were in fact mineral lands. For this purpose, it relies solely upon a pretended classification of such lands, which subdivision XXVIII of the complaint alleges was procured by the company's fraud and was made without regard to whether the lands were mineral or nonmineral (R. 63–65). The court dismissed that subdivision on demurrer

and therefore awarded compensation in accordance with the company's claim. In the Act of June 25, 1929, under which the suit was brought, Congress required the court to determine what excess lands or values the company has received as a result of fraud. Subdivision XXVIII presented the facts required for such determination. By striking it out, the court has avoided carrying out the direction of Congress to make this determination. That action in itself was error. Moreover, under the Act of February 26, 1895, a classification without fraud was a prerequisite to the right of selection and a fraudulent classification was ineffective. Thus the fraud alleged in the stricken subdivision destroyed all basis for the company's claim. In addition, it prevented the making of the required valid classification and thereby prevented the fulfillment of a condition necessary to performance by the United States of any obligation to permit selection of indemnity lands. The company is not entitled to make use of its own fraud to support its claim. *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62. Nor does the company have any right to compensation in equity. The United States effectively rescinded the right of selection before selections were made, the company's fraud blocked the restoration of the lands which it had voluntarily surrendered and it has already received in lieu of such lands other lands having equal or greater value. Thus, because of its fraud, the company's claim would fail

even against a private party. *A fortiori*, it may not have its claim against the United States just as if it had not sought to defraud the United States. *Causey* v. *United States*, 240 U. S. 399; *Pan American Co.* v. *United States*, 273 U. S. 456; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160.

2. *The basic Act of 1864 had become void.*—The greater part of the company's claim (R. 248) rests upon an unexercised right, granted by the Act of July 2, 1864, to select lands in the indemnity limits. Subdivision VI of the complaint alleged that that right had ceased to exist because that Act had become void at the end of two years as a result of the company's failure to procure within that time stock subscriptions and payments thereon required by the Act as a condition of its continued existence. The court erroneously dismissed that subdivision on demurrer on the ground that the United States was estopped to assert the ineffectiveness of the Act. The Act has not been reenacted or revived by subsequent legislation. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 270. Congress was not aware that the required conditions had not been performed. The company misrepresented to Congress that they had been performed and the United States granted large quantities of land to the company in reliance upon the misrepresentation. If any estoppel is to be found it is an estoppel against the company's assertion of the continued effectiveness of the Act.

3. *Compensation was erroneously based on non-agricultural lands.*—The company's right of selection of lands in lieu of mineral lands within the place limits was confined to "agricultural lands." Of the lands on which the court based the compensation awarded to the company, over 1,000,000 acres were not agricultural lands in the common sense. As to these lands, the company had no selection rights.

4. *Failure to complete the road.*—The company's right to make selections within indemnity limits had ceased to exist by the time the reserves including indemnity lands were set up (R. 608–615), because the company had failed to file definite locations for the whole railroad or to complete the construction of the whole road (R. 191, 220, 593, 23, 52). Section 8 of the Act of July 2, 1864, provided expressly that the obligations of the United States were subject to the condition that the company "complete the whole road." Compare *Cedar Rapids, &c., Railroad* v. *Herring,* 110 U. S. 27, 39. As no title, legal or equitable, to indemnity lands passes before selection, the conditional obligation of the United States was purely executory. The breach was substantial, more than ten percent, and went to the essence. As the United States did not receive performance, it was under no obligation to perform further. *Printing House* v. *Trustees,* 104 U. S. 711, 727; *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645, 661. In making the forest reserve withdrawals, the United States could stand on the com-

pany's lack of right, without assigning it as a reason for its action. *College Point Boat Co.* v. *United States*, 267 U. S. 12, 15–16. The Act of June 25, 1929 provided for a forfeiture of any rights which the company might have. As the company had no rights, no forfeiture was necessary. The United States is not seeking to take back anything but is merely keeping what it already had. *United States* v. *Oregon &c. Railroad Co.*, 176 U. S. 28, 49; *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 6.

5. *Failure to follow direct route.*—The only railroad authorized was "by the most eligible railroad route," Act of July 2, 1864, sec. 1, 13 Stat. 365, App. 37. It was required to follow the most direct and practicable line. *United States* v. *Northern Pacific R'd Co.*, 152 U. S. 284, 292; *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1, 13. Subdivision XXVI alleged that the company did not build by such a route but by one 82 miles longer. The court on the personal belief of the master that the allegations of this subdivision were untrue (R. 328) dismissed the subdivision on the company's demurrer and credited the company with 1,400,000 (R. 57) excess acres added by this unnecessary 82 miles of road. The company is not entitled to the credit.

6. *No estoppel or waiver.*—The Act of June 25, 1929 required the court to investigate and determine all the errors, mistakes, and frauds of the past as to this grant, not to be barred by estoppel or

otherwise. The company seeks compensation which it can get only under that Act. Therefore, it must conform to the requirements of the Act to permit an unhampered, just accounting. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429. The United States acted herein as a government for the general good, and not in a business. It is not barred by laches. It is not barred by *res judicata* because no judgment has been entered against it as to any *res* now in suit and no issue presented in this case has been tried or decided heretofore against the United States. *Myers* v. *International Co.*, 263 U. S. 64, 70–71; *Southern Pacific R'd Co.* v. *United States*, 183 U. S. 519, 533. The United States is not barred by any estoppel, acquiescence, or waiver. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 425. It has not misrepresented any facts to the company. The company has not been deceived or misled by the United States nor has it changed its position to its disadvantage in reliance on anything done by the United States. The United States has not done anything which is a waiver or acquiescence. Non-action by Congress even with knowledge is not action. *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234. Executive officers of the United States have not waived or acquiesced in any violation of law or breach of contract by the company. Nor are they authorized to do so. *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123; *Utah* v. *United States*, 284 U. S. 534, 545–546; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409.

7. *The losses are conjectural.*—The company sought compensation for deficiencies to the full extent of the grant (R. 248). It is impossible to ascertain what the company lost by the reserve withdrawals. It can recover no more than the amount it can show it lost. *Olson* v. *United States,* 292 U. S. 246, 255; *Bauman* v. *Ross,* 167 U. S. 548, 574. It has been awarded compensation for 1,453,061.02 acres (R. 642). There is nothing to show that it would or could have selected and obtained all of these acres if they had not been withdrawn. Until selected, they were subject to preferred rights of others to settle and enter before survey. Tit. 43 U. S. C. secs. 166, 861, 863; (R. 607, 610, 614); *Hewitt* v. *Schultz,* 180 U. S. 139; *Southern Pacific Railroad Co.* v. *Bell,* 183 U. S. 675, 687. The company had no right to select before survey. *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51, 61. The best lands doubtless would have been taken by others. The uncertainty caused by this probability should have been considered. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195. No title to these withdrawn indemnity lands ever vested in the company. *Humbird* v. *Avery,* 195 U. S. 480, 508. Difficulties of proof do not permit the substitution of conjecture. *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U. S. 156, 165. There is no reason to suppose that the company lost more by these withdrawals than it gained by the unlawful withdrawals described under point 14.

8. *Indian reservations were excepted from the grant.*—The only lands granted were "public lands" to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights" (Act of July 2, 1864, c. CCXVII, sec. 3, 13 Stat. 365, App. 40). Lands reserved to named Indian tribes by treaties prior to the granting act were not such lands. *United States* v. *O'Donnell,* 303 U. S. 501, 510, and cases there cited; *United States* v. *Shoshone Tribe,* 304 U. S. 111; *Shoshone Tribe* v. *United States,* 299 U. S. 476; *Northern Pac. Ry. Co.* v. *Wismer,* 246 U. S. 283; *Nor. Pac. Ry. Co.* v. *United States,* 227 U. S. 355; *Atlantic and Pacific Railroad* v. *Mingus,* 165 U. S. 413; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389, 395; *Northern Pacific R. R. Co.* v. *Musser-Sauntry,* 168 U. S. 604; *Bardon* v. *Northern Pacific Railroad Co.,* 145 U. S. 535, 542. Construction of treaty language should favor the Indian tribes. *United States* v. *Reily,* 290 U. S. 33, 9; *Marlin* v. *Lewallen,* 276 U. S. 58, 64; *United States* v. *Winans,* 198 U. S. 371, 380. The treaty Indian tribes acquired rights in the lands which were protected against taking them for others. *United States* v. *Klamath Indians,* 304 U. S. 119, 123; *Chippewa Indians* v. *United States,* 301 U. S. 358, 375–376; *United States* v. *Creek Nation,* 295 U. S. 103, 110. The agreement in section 2 of the Act of July 2, 1864, to extinguish Indian titles to lands "falling under the operation of this

Act" applies to the right-of-way granted and not to lands which did not fall under the operation of the Act but were excepted therefrom by prior reservations, appropriations or claims. Contrary to this law, large areas in place limits were patented to the company (Unprinted Ex. Z of Complaint, R. 66–70) by mistake, in excess of all available indemnity lands. At least this excess should have been credited to the United States and charged to the company. If they had been credited in this accounting, no deficiency would have existed at the time of the withdrawals for forest reserves, and the withdrawals would have been found valid and the company entitled to no compensation. The mistake of law by the Land Department does not bind the court. *Sanford's Estate* v. *Commissioner of Internal Revenue,* 308 U. S. 39; *Wisconsin Central R'd Co.* v. *Forsythe,* 159 U. S. 46, 61; *Haggar Co.* v. *Helvering,* No. 176, 1939 term.

9. *Crow reservation.*—The Resolution of May 31, 1870, confined the right to select from second indemnity limits to the amount of losses in the same state occurring after July 2, 1864. Before this suit was begun, the company had received patents for 1,400,934.83 acres (R. 597, Gov't Ex. 89 revised, not printed) in second indemnity limits in Montana. The Land Department computed the subsequent losses including the Crow at 2,636,-204.53 acres and the Crow losses at 2,434,082.80 acres (R. 786). Therefore the only subsequent

losses in Montana outside the Crow reservation described in the treaty of May 7, 1868, were 202,121.73 acres (R. 786). If these Crow losses were not subsequent losses, the company has received 1,198,813.10 acres to which it was not entitled. In addition, the award of compensation for 1,453,066.02 acres made by the decree includes compensation for 170,326.73 acres (R. 778, N. P. Ex. F, R. 613, 643, 644) withdrawn from Montana second indemnity limits for forest reservations and other purposes. These Crow losses were not subsequent losses because the treaty of May 7, 1868, did not make an original grant of this reservation but merely confirmed rights which had existed since the treaty of September 17, 1851, at the latest. When there is a subsequent recognition of a prior imperfect right the earlier right is senior to an intervening grant, particularly if the intervening grant has not been perfected by location filed before recognition of the earlier right. *Central Pac. Ry.* v. *Alameda County,* 284 U. S. 463, 473; *Cramer* v. *United States,* 261 U. S. 219; *Missouri, Kans. & Tex. Ry.* v. *United States,* 235 U. S. 37, 39. The mistake in the Land Department was a mistake of law and not of fact. It does not bind the court. *Sanford's Estate* v. *Commissioner of Internal Revenue,* 308 U. S. 39; *Wisconsin Central R'd Co.* v. *Forsythe,* 159 U. S. 46, 61. Therefore, the company has received 1,198,813.10 acres to which it was not entitled. It should be debited and the United

States credited with these and the company should receive no compensation for the 170,326.73 acres.

10. *The Northern Cheyenne Indian Reservation.*—The decree awards the company compensation for 32,483.92 acres within indemnity limits in the Northern Cheyenne Indian Reservation in Montana (R. 628, 468, 524, 643–644, 608, Gov't Ex. 146, 778, N. P. Ex. F:). The Act of June 25, 1929, 46 Stat. 41, took out of the grants to the company and retained for the United States only lands which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency upon the dates of withdrawals for governmental purposes, would be available for indemnity selection. This description does not cover lands in the Northern Cheyenne Indian Reservation. On September 17, 1851, by treaty these lands had been reserved for the Crow Indians. On May 7, 1868, after the date of the grant to the company, these Indians ceded them to the United States for a substantial consideration. By order of March 19, 1900, they became a part of the Northern Cheyenne Indian Reservation. On June 3, 1926, c. 459, 44 Stat. 690, Congress declared that the lands were the property of these Indians, authorized allotments, and provided (sec. 3) "that the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the

benefit of said Indians." With this history these lands were not, on June 25, 1929, a "government reservation" "retained by the United States" because in 1900 they had been set apart for the "permanent use and occupation" of the Indians and in 1926 they had been made the property of the Indians. They were not on June 5, 1924, a "government reservation." They were not withdrawn for "governmental purposes." They were not at the dates of withdrawal "available" for selection by the company. In the Act of June 25, 1929, government reservation is associated with "any national forest." The Act was designed to cover reservations for general public use or enjoyment to which the United States has full, unincumbered title. Here the Northern Cheyenne Indian Tribe for many years practically had owned these lands. *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116.

11. *Unsurveyed lands.*—In determining that, when withdrawals for the forest reserves occurred, there were deficiencies in the lands available for indemnity selection the court erroneously disregarded the unsurveyed lands lying within the indemnity limits outside the reservations (R. 612). These lands remained available for selection as indemnity lands as soon as surveys were made. Surveying was procedure. It did not change the substantive character of the lands. Congress cannot have intended that all valid withdrawals for forest reserves must wait until outside lands had been surveyed, particularly if their known char-

acter was such that the company would not select them and would not wish to pay the surveying charges on them.

12. *Subsequent restorations.*—The court, in determining the company's right to compensation because of the invalidity of withdrawals for the forest reserves, did not take into consideration the subsequent restorations to the public domain and subsequent surveys, although, by virtue of these, adequate lands were available to satisfy selections so that there was no actual deficiency injurious to the company. The court has held withdrawals invalid (R. 611, 612, 613) although the company might have made selections from lands subsequently restored and failed to do so. This is submitted as error (R. 656, assignments 36 to 39). As the company had no title in the lands withdrawn for the forest reserves there was no breach of contract by the United States in making the withdrawals if the United States was in a position to fulfill the selections when the company made them.

13. *Homestead entries subsequently patented.*—The district court has awarded compensation to the company for 2,480.91 acres on which homesteaders have made entries before June 5, 1924, pursuant to which they received patents (R. 628). The Act of June 25, 1929 (46 Stat. 41), under which the company presents its claim for compensation (R. 248), provides that in order to serve as a base for compensation the land must have all of these four qualities (1) that it is taken out and removed from the grants, (2) that on June 5, 1924, it was embraced

within the exterior boundaries of a government reservation, (3) that it was available to the company for indemnity selection, and (4) that it was retained by the United States as part and parcel of the government reservations. This land did not meet these four requirements because the homesteaders' titles had been initiated by their entries. *Knapp* v. *Alexander-Edgar Lumber Company,* 237 U. S. 162, 167, 169; *Cornelius* v. *Kessel,* 128 U. S. 456, 461; *Exchange Trust Co.* v. *Drainage Dist.,* 278 U. S. 421, 425; *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428, 434; *Deffeback* v. *Hawke,* 115 U. S. 392, 405. After the entries the company could no longer acquire title by indemnity selections. *Oregon &c. R. R.* v. *United States,* No. 1, 189 U. S. 103, 112–115; *Osborn* v. *Froyseth,* 216 U. S. 571, 576; *Svor* v. *Morris,* 227 U. S. 524, 527; *Hewitt* v. *Schultz,* 180 U. S. 139, 145, 157; *United States* v. *Northern Pacific Railway Company,* 256 U. S. 51, 64. Such lands were not removed from the railroad grant, because the entry had excepted them therefrom. Nor were they retained by the United States as part of the government reservations.

14. *Accountability for unauthorized profits.*— Subdivision XXXII alleged these facts: Lands were withdrawn for the company upon the filing of general locations and so kept from settlement and entry for many years when by law they were to be open to settlement and entry. They remained withdrawn until the company subsequently filed

definite locations and took the lands as place lands. Also, upon the filing of definite locations, the lands in the indemnity limits as well as lands in the place limits were withdrawn from settlement and entry although the lands in indemnity limits should have remained opened for settlement and entry (R. 73). Thereby the company acquired great values to which it was not entitled and which otherwise would have gone to others under the general land laws (R. 72, 73). Subdivision XIII alleged that the company had failed to open for settlement and preemption at $2.50 an acre the lands which the Resolution of May 31, 1870, required so to be opened (R. 23). The court held both subdivisions demurrable and dismissed them (R. 412, 369, 378). The United States as a government and not as part of a commercial enterprise had provided that these lands should be opened to preemption and settlement—the place lands until the time of definite location and the indemnity lands until selection was made—and had provided that, at a date prescribed by the Resolution of May 31, 1870, even if the company had obtained the lands, they were to be opened to settlement and entry at $2.50 an acre. The United States was interested in the development of the country and was injured by having that development prevented or delayed. The amount of the injury is vast. The company should not profit by its breach of contract with the United States. The $2.50 an acre was the full measure of the company's interest in the lands. The extra profits to

the company from the breach are illegal emoluments, *Oregon & California Railroad Company* v. *United States*, 238 U. S. 393, 421, 436, 243 U. S. 549, 559, for which the company should be required, as a constructive trustee, to account to the United States. *Angle* v. *Chicago, St. Paul &c. Railway*, 151 U. S. 1, 26; *Moore* v. *Crawford*, 130 U. S. 122, 129. *Hopkins* v. *Grimshaw*, 165 U. S. 342, 355; *Chater* v. *Carter*, 238 U. S. 572, 586. The Act of June 25, 1929, does not contemplate that the company shall retain these profits without accountability and at the same time receive the compensation awarded to it for 1,453,061.02 acres (R. 642). When the company avails itself of this Act to get compensation (R. 248) it must make a just accounting of the illegal emoluments which it has obtained.

15. *Tacoma overlap.*—The district court was right in holding that the company is not entitled to compensation for lands in the second indemnity belt erroneously laid down opposite the line from Portland to Tacoma (R. 620, 528, 508–519). As the company was not entitled to indemnity selections for lands which actually it had obtained within the overlap at Tacoma, the public lands in the first indemnity belt, remaining at the time of the final location of the road in the State of Washington, were more than sufficient to satisfy all losses in Washington and there was no authority to establish a second indemnity belt or to resort to it to satisfy losses. The Resolution of May 31, 1870, was not antagonistic but supplemental to the Act of July 2, 1864.

The Act, as so supplemented, gave lands by description and not by quantity. *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 627, 629, 117 U. S. 228; *Wisconsin Central Railroad Company* v. *Forsythe*, 159 U. S. 46, 57–58; *United States* v. *Oregon and California Railroad Company*, 164 U. S. 526, 537; *United States* v. *Northern Pacific Railroad Company*, 193 U. S. 1, 9. The Resolution and the Act are *in pari materia*, 193 U. S. 1, 9, to be interpreted together. The company should have no greater right than it would have if the Act and the Resolution were a single enactment. *Employers Corp.* v. *Bryant*, 299 U. S. 374; *United States* v. *La Franca*, 282 U. S. 568, 576; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 362; *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39. There can be no right to get indemnity lands in lieu of lands which the company has and keeps. For a second reason, compensation based on these lands was properly denied. The Resolution of May 31, 1870, granted no second indemnity for the line from Tacoma to Portland, because that grant to the company was not "within the limits prescribed by its charter" of July 2, 1864. This charter fixed the western limit at Puget Sound for the main line and at Portland for the branch, with no line between Portland and Pudget Sound or Tacoma. The purpose of the second indemnity provision was to make up deficiencies in the origi-

nal grant resulting from settlements and entries made since its date, July 2, 1864. The debates in Congress confirm this. Compensation was denied properly for a third reason. As the company never completed a main line via the valley of the Columbia River and thence to Puget Sound it had no right at the time of the forest reserve withdrawals in 1898 and thereafter to make indemnity selections opposite the line from Tacoma to Portland, which is no part of the actual main line, but finally has turned out to be only a branch. The Resolution of April 10, 1869, 16 Stat. 57, expressly provided that a branch line from Portland to Tacoma should have no land grant outside its right-of-way. The compensation awarded to the company, to the extent of 155,727.84 acres (R. 642, 644), is for indemnity selection rights held below to have been forfeited by the Act of June 25, 1929, opposite this line. There were no such rights to forfeit. When the forest reserve withdrawals were made the company had no right to make selections opposite this line.

ARGUMENT

1. The company cannot maintain its claim for compensation for loss of indemnity selection rights because that claim is based solely on a false classification of land as mineral procured through the company's own fraud and corruption

Subdivision XXVIII of the complaint (R. 60–65) alleged fraud and corruption on the part of the company in procuring a pretended classification

of less valuable lands as mineral lands and more valuable lands as nonmineral lands, and in receiving and retaining the more valuable lands known to be the product of that fraud. On the company's demurrer (R. 349), contained in the same pleading as its prayer for compensation (R. 229, 248), the court dismissed this subdivision (R. 411, 412). It is submitted that its dismissal was error, one of the consequences of which is the granting (R. 642) of the company's prayer (R. 248) for compensation for the loss of indemnity selection rights for 1,453,061.02 acres. To the extent of more than 1,000,000 acres (R. 778, N. P. Ex. E), this claim was based on a claimed loss of an equal number of acres in place limits, asserted by the company to be mineral lands solely on the basis of the false and fraudulent classification.

The error in dismissing subdivision XXVIII arose (A) from disregarding the express terms of the Act of June 25, 1929, (B) from failure to recognize the evident legal and equitable defenses alleged, and (C) from failure to perceive the real posture of the case.

A. *The Act of June 25, 1929, required the court to determine what the company had received and was seeking as a result of the fraud alleged in subdivision XXVIII*

The Act of June 25, 1929, 46 Stat. 41, under which this suit was filed, in section 5 directed the Attorney General to present to the court allega-

tions of fraud such as those made in subdivision XXVIII. Section 6 unqualifiedly required the court to determine what quantities in land or values the company has received, as a result of fraud, in excess of the amounts it was entitled to receive. Under the express direction of the latter section the court was not required or permitted to avoid this determination because of laches, estoppel, acquiescence or waiver, particularly if those defenses themselves grew out of fraud.

Congress plainly intended that the questions whether fraud had occurred and, if it had, its effect on the respective rights of the United States and of the defendants, should be determined by the courts and by the Supreme Court. *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 465.

Subdivision XXVIII presented those questions. By striking it out, the court below has failed to carry out the direction of Congress to decide these issues. For that reason, without more, it is submitted that it was error to strike that subdivision from the complaint.

B. *The facts alleged showed that the company could not maintain its claim either at common law or in equity*

(1) The company was in the position of a cross-plaintiff with the burden of proving its right to compensation. The fact that this suit for accounting was launched by the United States and therefore named the company a defendant did not

change the essential character of the company's position at the hearing on demurrer. It presented a claim (R. 248) for compensation for loss of an asserted right to select indemnity lands on a base of lands within the place limits which it claimed were mineral lands. It could not establish its claim without showing that these base lands were in fact mineral lands. To show this it relied solely upon a classification of the base lands which subdivision XXVIII alleged to be fraudulent.

(2) The fraudulent classification did not prove that the place lands which the company tendered as base were mineral. The classification was legally nugatory unless it had become final by the terms of the Act of February 26, 1895, c. 131, 28 Stat. 683 (App. 95). This is not a case where the fraudulent classification was effective unless rescinded. Its effectiveness rested entirely upon the terms of the statute which provided that "the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud." Section 6, 28 Stat. 685. Under the terms of the statute a classification induced by fraud was as ineffective in favor of the defrauding party as if it had never been made.

Thus, in *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185, 193, where an engineer's certificate was a prerequisite and was to be final, the court treats it as self-evident that the certificate is inoperative if it is fraudulent.

Since, under the Act of February 26, 1895, 28 Stat. 683, a classification free from fraud was an absolute prerequisite to any right to select indemnity lands in lieu of mineral lands, and since, under that Act, a fraudulent classification never became final and had no legal effect, the facts alleged in subdivision XXVIII showed that the right claimed by the company to select indemnity lands on a mineral base and to receive compensation in lieu of such lands was completely lacking in any legal foundation.

Moreover, the existence of a classification free from fraud is a condition precedent under the Act of February 26, 1895, 28 Stat. 683, to any obligation of the United States to permit such selections of indemnity lands in lieu of mineral place lands.

The true classification for which Congress provided by the Act of February 26, 1895, was to be fully completed under section 2 of the Act within four years and was to be based on the significant facts then in existence and then ascertainable by examinations to be made at that time. That classification can never be made. Thus the fraud of the company in procuring a classification which was a mere pretence has made impossible an honest classification made in the way prescribed by Congress in that Act. Accordingly, even if the United States had no stronger defenses against the claim than a private litigant would have, proof of the fraud alleged in the stricken subdivision would provide a complete defense to this claim under the well-settled

principle which prevents recovery by a party who, by his conduct, has prevented the fulfillment of a condition precedent to performance by the other party to the contract.

Prevention of performance of a contract is a complete answer to the claim of breach in nonperformance. In *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62, the Court said: "'He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified."' * * *." *United States* v. *Peck,* 102 U. S. 64, 65, more fully reported in 26 L. Ed. 47; *Tanenhaum* v. *Francisco,* 110 N. J. L. 599, 605 (1933), 166 Atl. 105, 107; *Kress House Moving Co.* v. *George Hogg Co.,* 263 Pa. 191, 195 (1919), 106 Atl. 351, 352.

Similarly, where decision by particular architects or engineers is a prerequisite (as in this case classification by certain mineral land commissioners appointed in 1895 was required) and one of the parties tampers with the particular architect or engineer so that an honest or unbiased decision has become impossible, he cannot recover under the contract because the condition cannot be performed. *Gonder* v. *Berlin Branch R. Co.,* 171 Pa. 492, 499 (1895), 33 Atl. 61, 62; *Atchison T. & S. F. Ry. Co.* v. *West,* 176 Cal. 148, 152 (1917), 167 Pac. 868, 869; *Ilse* v. *Aetna Indemnity Co.,* 55 Wash. 487, 491 (1909), 104 Pac. 787, 788; *Zimmerman* v. *Marymor,* 290 Pa. 299, 303 (1927), 138 Atl. 824, 825.

The fraud alleged in subdivision XXVIII causes the company's claim to fail also under an application of the rule that the law will not aid in the enforcement of a claim based upon an immoral or an illegal act. *Harris* v. *Runnels,* 12 How. 79, 83; *Ewell* v. *Daggs,* 108 U. S. 143, 149; *Crocker* v. *United States,* 240 U. S. 74, 78.

(3) The company has no right to compensation in equity. It never acquired legal title to the indemnity lands for which it claims compensation. Nor did it ever have possession of them. Its right to select them was effectively rescinded. Before the selections were made, the United States, already having the indemnity lands, publicly made known its determination to keep them permanently and thereby informed the company that it was to have no selections from them. It makes no difference that under the decision in *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51 (April 11, 1921), the United States, in case of a deficiency, would have no right, in the absence of the company's fraud, to keep the lands. It asserted a right and made its election known to the company at a time when, because of its own fraud, the company had no right to select them. It is immaterial that the United States did not know that the company had no such right. Cf. *College Point Boat Co.* v. *United States,* 267 U. S. 12, 16. The rescission is as effective as if the United States had based its election to keep the lands on the company's

fraud rather than on an unfounded claim of right to keep unselected indemnity lands.

The situation resulting from the company's fraud has blocked the possibility of restoring to the company, after this rescission, the nonmineral lands which the company had caused to be classified as mineral. In circumstances brought about by the company's own fraud, Congress alone had power to restore these lands to the company. Before Congress was aware of the fraud, many of the place lands falsely classified as mineral had been disposed of and could not be returned. The fraud itself prevented restoration of the situation existing before the company practiced the fraud.

Moreover, the allegations of the stricken subdivision show that if the United States accounted for the proceeds of the nonmineral place lands fraudulently classified as mineral lands and the company accounted for the indemnity lands received in lieu of such lands, the value of the indemnity lands already received by the company as a result of the fraud equals or exceeds the value of the place lands retained by the United States. Subdivision XXVIII alleges that of approximately 11,500,000 acres classified, 3,782,377 acres in place were by mere pretense classified as mineral lands, and that the company has received in lieu of them 1,330,762 acres of indemnity lands having a value equal to or greater than the total value of all of the land classified as mineral, whether in fact mineral or in fact nonmineral (R. 61–62).

Nothing in equity, then, bars the assertion of the fraud by the United States or its insistence that the fraudulent classification be ignored and the claim denied. Subdivision XXVIII shows on its face that already the company has received full equivalent value for the land surrendered, and has no right to compensation.

(4) But still further defects in the company's claim are apparent from the allegations of the stricken subdivision.

The company must bear the consequences of its fraud on the United States. The United States is not limited here merely to the rights and defenses which private parties would have. Even if the confused interests of the United States and others which have emerged in the last forty years could be dissected in such a way as to bring about the situation which would have existed if the company's fraud had not precluded an honest classification, and even if the company had not already received as much in value as it has surrendered, it is apparent from the allegations of subdivision XXVIII that the company falls afoul of the principle that a party who attempts to practice a fraud upon the United States is not, when the United States seeks redress because of the fraud, entitled to obtain all the benefits which it would have obtained if it had never made the attempt. The United States is not to be defeated in recovery because it cannot return the consideration, and the

wrongdoer cannot, because of the failure to return the consideration, have its claim just as if it had not sought to defraud the United States. *Causey* v. *United States,* 240 U. S. 399; *Pan American Co.* v. *United States,* 273 U. S. 456; and *United States* v. *Trinidad Coal Company,* 137 U. S. 160.

For example, in *Causey* v. *United States, supra,* the United States sued Causey to annul a patent on the ground of fraud and it was objected that the scrip which the United States had received had not been returned. The court said, 240 U. S. 402: "The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country * * *. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that

the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded."

If perfection of equitable adjustment cannot be attained, the loss should fall upon the one by whose fraud the situation was created, not upon the United States. For these several reasons, the absence of any foundation for the company's claim is plainly evident on the face of subdivision XXVIII.

C. *The striking out of subdivision XXVIII was based upon a misunderstanding of its import*

It is apparent from the record that both the master and the court decided to sustain the demurrer to subdivision XXVIII as a result of a misconception of its purpose, and not upon a direct consideration of the legal effect of its allegations but largely upon their interpretation of comments by counsel as to its purpose.

For example, the master states that he would have overruled the demurrer to subdivision XXVIII were it not for the position taken by the Government in letters and written argument (R. 346). He pointed out that the facts alleged constituted fraud on the United States (R. 345, 346); that it was not barred by laches (R. 342); and was not so obviously barred by estoppel that estoppel could be found without further hearing (R. 344). Despite these conclusions, which obviously were

drawn from the allegations of the complaint itself, he concluded, in reliance upon his interpretation of statements made by counsel, that the demurrer to subdivision XXVIII should be sustained (R. 349).

The court also misconceived the purpose of subdivision XXVIII and approved and adopted the course of reasoning of the master and his action in sustaining the demurrer (R. 411–412). From statements made during oral argument of counsel, the court reached the mistaken opinion that the sole purpose of the allegations was to give rise to the application of the "clean hands" doctrine and ruled that they were not sufficient to call for the application of that doctrine and should be stricken from the bill (R. 410). The allegations of the subdivision contain no such limitations.

Both these rulings are based on misconception of the purpose and effect of the allegations. Both rulings rest upon collateral representations as to their purpose, which, regardless of whether they were inaccurate or merely misunderstood, did not alter the effect of the allegations themselves. The United States could not be estopped in such a way. *Utah* v. *United States*, 284 U. S. 534, 545–546.

The complaint was not amended by any brief or oral statement of counsel and could not have been so amended. It did not seek, and was not required under the statute to seek, the particular relief which the master seemed to think it sought. Instead it showed that the company, because of its

fraud, had no legal or equitable right to the compensation for which it prayed. Any oral statement that it was designed to raise the "clean hands" doctrine did not change its character. Moreover the printed briefs filed on behalf of the United States showed that the position of the United States was exactly that which is apparent from the complaint itself and that the United States relied upon the complaint according to its terms.

The existence of a valid classification of place lands as mineral lands was, under the statute, an absolute condition precedent to the company's right to indemnity selection and to any right to receive the compensation claimed. If the company procured the classification by fraud, it was invalid and ineffective to support the rights asserted by the company. Subdivision XXVIII alleges fraud which vitiates the classification and thereby leaves the company without any basis for its claim. Moreover, as the result of that fraud it has received already, land more valuable than that which it voluntarily rejected as part of its fraudulent scheme (R. 62). Nevertheless, these allegations having been stricken, the company in response to its prayer for compensation (R. 248) has an affirmative decree for compensation, based on its own fraud (R. 639, 642).

Such a result seems evident error.

2. The United States is not estopped from showing that the Act of July 2, 1864, on which the Company bases its claim to indemnity selection rights, became null and void for the company's failure to obtain the bona fide subscription to its stock, and payments thereon, required by that Act as a condition to its effectiveness after two years

Subdivision VI (R. 8), which was stricken from the bill by the court, stated in brief, the following facts as a defense to the company's demand for compensation: Section 19 of the Act of July 2, 1864, 13 Stat. 365 (App. 51), provided that unless *bona fide* subscriptions for stock of the corporation to the amount of $2,000,000 with 10% paid thereon were made within two years after July 2, 1864, the Act would be null and void. Although within two years pretended subscriptions for 20,075 shares and pretended payments of $10 per share were made and officers and directors elected, *bona fide* subscriptions for $2,000,000 had not been made nor had payment been made of $10 per share on the 20,075 shares or any part thereof. The pretended payment was a sham and a fraud against the corporation and against the United States and constituted a breach of contract between the corporation and the United States.

The greater part of the grant of lands was made by the Act of 1864, *Northern Pacific Railway* v. *DeLacey*, 174 U. S. 622, 638; *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 5; *United States* v. *Northern Pacific Rd. Co.*, 152 U. S. 284,

294, and the decree (R. 642) allows compensation to the extent of 1,297,333.18 acres for the loss of rights asserted under that Act. Therefore the decree must rest on the ground that the Act of 1864 remained effective up to June 25, 1929. Otherwise, the company had no indemnity selection rights at that time.

As no title, legal or equitable, to any of the indemnity lands had vested in the company, no question of a forfeiture or resumption of title is involved in this point.

The master stated that if the facts alleged in subdivision VI were open to inquiry the Act became null and void without the need of any proceedings by the government, but ruled that they were not open to inquiry because Congress subsequently had treated the company as properly incorporated (R. 289–297) and that the government could not be heard thereafter to dispute the due and regular organization of the railroad company and its *de jure* existence (R. 297).

The court approved these reasons (R. 411). They do not support the ruling. The master and the court have failed to advert to the real questions presented by the demurrer to this subdivision.

Even if the corporation came into existence during the two years of the life of the Act and has continued in *de jure* existence ever since, it does not follow that it retained the right to make indemnity selections if the Act became void. A corporation created under a valid act may not cease

to be a corporation when the act ceases to exist either by its own terms or by repeal. Yet, if there is no act in existence thereafter, the corporation cannot, merely because it continues to exist, enforce rights against the incorporating government which rest only upon the statute which by its terms is no longer effective.

The master did not find or rule that the Act did not become void on July 3, 1866, or that it was re-enacted thereafter. Nor did he find that Congress knew of the sham. He does find, on the other hand, that Congress "may have thought nothing about it. It may just have assumed without inquiry that the terms of the Act requiring the subscription and the down payment had been observed" (R. 297). He based his ruling solely on the conclusion that the United States is barred by estoppel from alleging the truth of the matter. The court approved this conclusion (R. 411) and gave no other reason for dismissing subdivision VI. It is submitted that the conclusion is erroneous.

On the facts alleged in subdivision VI, the Act has not been in existence since July 3, 1866. The United States cannot be barred by estoppel from showing this.

In *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 267–270, in holding that an Act, invalid when enacted, was not made valid by subsequent legislative adoption, this Court said (p. 267): "There

can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties." * * * "The doctrine of estoppel is totally inadmissible in the case." * * * (p. 270): "* * * The most that can be said is, that, in referring to the act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the act of 1857, as a law, can be gathered from the terms of the act of March 27, 1869. To give to such a reference in a subsequent act, as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous, and would lay the foundation for evil practices."

On this question of estoppel there is no difference between an act which never came into existence and one such as that involved here which had ceased to exist.

None of the subsequent acts of Congress supports the position of the court below. Of the legislation to which the master refers (R. 289–296) the most significant is the Resolution of May 31, 1870, on which the decree is based to the extent of 155,727.84 acres (R. 642). That resolution did not purport to reenact the void act, and could not revive it without

indicating an intention to do so. Just as in *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 270, Congress in this case "inadvertently supposed" that a valid act existed. "Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish" the Act of 1864 as a law, can be gathered from the later Resolution. Congress did not profess, in the Resolution, to revive a dead act. Plainly, as in that case, 94 U. S. 270, it only referred to its provisions for the purposes of the Resolution then passed. When in 1870 Congress said that the company could locate and construct "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation," 16 Stat. 378; (App. 57), it meant just what it said and no more. The company was to get just what the Act of July 2, 1864 gave it. If, as subdivision VI alleges, that act had ceased to exist, the company got nothing.

Moreover, even if an estoppel could be effective against the United States with respect to the existence of rights under this voided grant, none of the elements of an estoppel against the United States are to be found. The act lapsed by its own terms and has never been revived or reenacted. It does not appear that the company has changed its position to its disadvantage in reliance upon any knowing representation by the United States that the law was effective. On the contrary, such misrepresentations as there may have been were the com-

pany's representations that the condition to the law's continued effectiveness had been fulfilled, and in reliance upon its belief that that was the fact, the United States has conferred great benefits on the company out of the public lands. If there is any estoppel here, it must be that the company is estopped to rely upon the continued effectiveness of the Act.

For example, the possibility found by the master (R. 297) that Congress assumed that the terms of the Act requiring the subscription and payment for stock had been complied with doubtless accords with the fact. Notwithstanding its contract obligation to do so, the company never informed Congress otherwise, but, on the contrary, pretended to Congress repeatedly that it had obtained the bona fide subscriptions and payments essential to the continued validity of the Act.

Once the pretense came as follows: The Act, sec. 1, 13 Stat. 367 (App. 37–38) provided that the corporators should be commissioners to organize. It did not authorize the election of directors until "so soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company." On December 29, 1864, the company claimed to have organized *as required,* and filed its acceptance with the President of the United States (R. 178, 264).

Again on December 17, 1867, S. Misc. Doc. No. 9, 40th Cong., 2d sess., p. 1, the company presented to Congress a memorial signed by the president and

directors as such, saying "The undersigned, president and directors of the Northern Pacific Railroad Company, respectfully represent that * * * The corporators organized under their charter in the summer of 1864 * * * it was found impracticable * * * to induce capitalists to embark in the enterprise." Under the provisions of the Act, there could be no directors except after the subscriptions in good faith and actual ten percent payment required by sections 1 and 19 of the Act, had been received by the corporation. Thus this memorial signed by the directors amounted to a representation that the required bona fide subscriptions and payments had been received.

Thereafter, in 1874, in another formal memorial (Vol. 5, H. Misc. Doc. No. 272, 43rd Cong., 1st sess., 1873–1874, p. 2), the company pretended to Congress that, during the war, "the subscription then only reached the amount required to save the charter." This meant that during the war, that is, before 1866, the company had obtained the required bona fide subscriptions and payments.

Under the allegations of subdivision VI these pretenses were false. On the basis of such misrepresentations the United States has proceeded to its disadvantage, believing the act to have remained effective, to shower upon the company beneficences to which the company has had no right.

It appears that even if the company should get no compensation for the 1,453,061.02 acres in the reserves, it has fared richly already at the hands

of the United States. Before June 5, 1924, the United States had conveyed to it a total of 39,473,369.08 acres of land (R. 642). By the decree of June 27, 1939, the company is to receive patents for 428,986.68 acres more (R. 643). As appears from the allegations of subdivision XXVIII, discussed in point 1 above, (p. 53), the value of the indemnity lands already received by the company equals or exceeds the place lands it has surrendered.

In these circumstances no basis can be found for an estoppel to bar the United States from showing that the fundamental act had ceased to be effective before the withdrawal of lands from the indemnity limits into the forest reserves. On the contrary they disclose an estoppel against the company which misrepresented facts upon which the United States relied to its disadvantage.

It is submitted that the court plainly erred in dismissing subdivision VI of the complaint (R. 411–412, 297) and in awarding compensation for loss of indemnity selection rights based on the Act of July 2, 1864, which, under the stricken allegations, had become void at the end of two years.

3. The phrase "agricultural lands" in the grant of 1864 as used in the common sense meant tillable, cultivable lands, and not simply nonmineral lands

The decree below sustained the right of the company to select over one million (R. 778 N. P. Ex. E) acres of land as "agricultural lands" in lieu of mineral losses, although these lands, as found by the special master, "are not agricultural

lands in the sense that they are tillable" (R. 450, 457, 523, 625), but "are principally that vast tangle of mountains and forests, and rivers and valleys, contained in the national forests of the United States, beginning with the Custer on the east and extending in almost unbroken connection to the group of forest reservations along the Cascade range" (R. 449). Much of the area in the twenty-two national forests involved here consists of snowclad mountain tops above timberline.[1]

The United States contends that only so much of the areas as is agricultural in fact—that is, capable of cultivation—was selectable for mineral losses, and that any other construction ignores the evident meaning and purpose of the Act and the common meaning of "agricultural lands."[2]

The Act of July 2, 1864, granted *"public land, not mineral"* within the primary limits of the grant, and for all such lands as had been lost to the grant because they had been sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, the railroad could select *"other lands."* However, in lieu of mineral lands reserved to the

[1] See Exhibits 245, 246, 247, Panoramas, Snoqualmie, Rainier, Wenatchee National Forests; Exhibit 240 a to e, Clearwater National Forests; 242 a Bitteroot National Forest; 243 a–b, Kaniksu National Forest; Exhibits 237 to 268, inclusive.

[2] Dictionary of the English by Samuel Johnson, London, 1755; Charles Richardson's English Dictionary, London and New York, 1839; Encyclopedia Americana, Boston, 1856; Encyclopedia Dictionary by Robert Hunter, printed by Cas-

United States, the company's right to select was confined to *"unoccupied and unappropriated agricultural lands"* nearest to the line of the road and within fifty miles thereof. (App. 41, Section 3.)

Thus, a special indemnity provision allowing selections in *"agricultural lands"* in lieu of mineral losses must be construed in juxtaposition to a general indemnity provision allowing selections in *"other lands."*

As will be shown presently in greater detail "agricultural" meant in 1864 what it was generally understood to mean by Senators and Representatives in Congress. It was not a special trade term or a term of art in any subdivision of the government of general affairs. There were 50 Senators and 181 Representatives.[8] The only states west of the Missouri River represented were California, Oregon, and Kansas, which provided 6 Senators and 5 Representatives.

Thus Congress was overwhelmingly from the east of the Missouri River and knew the language of the eastern side of the country. To them, agriculture meant farming, cultivation of the soil, just as it did to this Court four years before July 2,

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sell, Petter, Galpin & Company of London, Paris, and New York, 1879; Ogilvie's Imperial Dictionary, Century Company, New York, 1883; Murray's English Dictionary, Oxford, 1888; Standard Dictionary of the English Language, Funk & Wagnall's Company, 1894; Century Dictionary and Encyclopedia, Century Company, 1899.

[8] Blaine, Twenty Years of Congress, Volume 1, pp. 316, 500.

1864, when, in *Kimbro* v. *Bullitt*, 22 How. 256, at 268, the Court said of "farming," that its "principal object is to make profits out of the soil, by gathering its fruits."[4]

The President who signed the act knew that the trees were in the way, and the land, if tillable, was more valuable after the trees and stumps were gone. These men never conceived of that "vast tangle of mountains and forests," as farm lands, "agricultural lands."

That Congress used the words "agricultural lands" in their plain and ordinary sense as meaning lands which are "tillable" or "capable of cultivation" is made overwhelmingly clear by (a) the legislative history of the Act contrasted with other land grants; (b) by the segregation of "agricultural land" from "mineral lands" under the Act of July 26, 1866, and by other contemporaneous legislation; (c) and by the administrative practice and rulings of the General Land Office, Department of the Interior.

(a) *Legislative history of the act; origin of indemnity provision*

In 1850 Congress passed the first railroad land grant act, principally for the Illinois Central railroad. It granted six sections on each side of the

[4] *First National Bank* v. *Beach*, 301 U. S. 435, 438; *Hart-Parr Co.* v. *Barkley*, 231 Fed. 913, 915 (C. C. A. 8); *In re Stubbs*, 281 Fed. 568 (D. C. Wyo.); *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 531.

road and, where land had been sold or preempted at the time the railroad was "definitely fixed," lands of the United States *"most contiguous"* could be selected in lieu thereof within "fifteen miles from the line of the road."[5]

The requirement that indemnity lands be *"most contiguous"* to the line of the road was inserted in order that the portion of the country most benefited by the building of the road would bear the burden of the grant made in aid to its construction.[6] Such a provision, expressing a basic rule of land grant law, is found in every railroad land grant between 1850 and 1864,[7] and was commonly known

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[5] Act of September 20, 1850, c. 61, 9 Stat. 466.

[6] Cf. Northern Pacific R. R. Co., 17 L. D. 404, 405 (1893).

[7] Act of June 29, 1854, c. 72, 10 Stat. 302 (Minnesota); Act of May 15, 1856, c. 28, 11 Stat. 9 (Iowa); Act of May 17, 1856, c. 31, 11 Stat. 15 (Florida and Alabama); Act of June 3, 1856, c. 41, 11 Stat. 17 (Alabama); Act of June 3, 1856, c. 42, 11 Stat. 18 (Louisiana); Act of June 3, 1856, c. 43, 11 Stat. 20 (Wisconsin); Act of June 3, 1856, c. 44, 11 Stat. 21 (Michigan); Act of August 11, 1856, c. 83, 11 Stat. 30 (Mississippi); Act of March 3, 1857, c. 99, 11 Stat. 195 (Minnesota and Alabama); Act of March 3, 1863, c. 98, 12 Stat. 772 (Kansas); Act of May 5, 1864, c. 79, 13 Stat. 64 (Minnesota); Act of May 5, 1864, c. 80, 13 Stat. 66 (Wisconsin); Act of May 12, 1864, c. 84, 13 Stat. 72 (Iowa); Act of July 1, 1864, c. 198, 13 Stat. 339 (Kansas). Cf. grants for military roads contained in the Act of March 3, 1863, c. 104, 12 Stat. 797 (Michigan and Wisconsin), and in the Act of June 20, 1864, c. 137, 13 Stat. 140 (Michigan). See also grant to Ohio for canal purposes contained in Act of June 30, 1834, c. 137, 4 Stat. 716 (lieu selections to be made "from other lands in the neighbourhood near the line of said canal"); see opinion of Attorney General Gilpin, 3 Op. A. G. 552 (1840).

and recognized in and out of Congress, by the Attorney General, and by the Secretary of the Interior.[8]

However, in the Northern Pacific grant of 1864, for the first time, this requirement of the general indemnity provision that selections be made "most contiguous" or "nearest" to the line of the road was omitted. *Any* "other lands" could be taken. The general rule is revived, however, as to the mineral indemnity provision where "agricultural lands" are to be selected "nearest" to the line of the road and "within 50 miles thereof." Why?

In the fertile lands of the midwest one section of land was about as valuable as another and taking lands "nearest" to the road imposed no hardship on the road and provided an ample supply of valuable lands. But for roads to the Pacific,[9] which passed through long stretches of worthless lands, indemnity selections "nearest" to the road would have required the selection of barren mountain areas, and in crossing mountain ranges where the only lands of great value were mineral lands, the railroad might receive little of value unless it were given the right to search for "agricultural lands" in lieu of mineral losses.

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[8] Opinion of August 7, 1852, 5 Op. A. G. 603, 608. See also opinion of March 10, 1852, 5 Op. A. G. 518, 520. Cf. 1 Lester, Land Laws (1860) 514, 516, 526.

[9] Act of July 2, 1864, c. 217, 13 Stat. 365 (Northern Pacific Railroad); Act of July 27, 1866, c. 278, 14 Stat. 292 (Atlantic and Pacific Railroad); Act of March 3, 1871, c. 122, 16 Stat. 573 (Texas Pacific Railroad).

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Members of Congress and the Senate were fully advised of the character of land in the west through reports covering explorations of possible routes to the Pacific,[10] compiled pursuant to the Act of 1853,[11] published in eleven volumes. Included in these reports was a summary tabulation referred to time and again while the Pacific railroad bills were being debated in the House and the Senate[12] showing "the number of miles of route through *arable land*"; "the number of miles of route through lands generally *uncultivable, arable* soil being found in small areas"; "number of square miles of sums of areas of largest bodies of *arable* land in uncultivable region."[13]

While these surveys had partially dispelled a common belief that the entire region west of the 97th meridian was a barren waste, they also brought out the fact that these lands, unlike those of the midwest, were not all of equal value.

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[10] S. Exec. Doc. No. 78, 33d Cong., 2d Sess. (1855–59) (Ser. Nos. 758–768); H. Exec. Doc. No. 91, 33d Cong., 2d Sess. (1855–59) (Ser. Nos. 791–801).

[11] Act of March 3, 1853, sec. 10, c. 98, 10 Stat. 214.

[12] Cf. Cong. Globe, 35th Cong., 1st sess. 1600 (1858); Cong. Globe, 35th Cong., 2d Sess. 486 (1859); Cong. Globe, 37th Cong., 2d Sess. 2678 (1862). It is also significant that this table was read into the record by Senator Gwin of California, on the very day (April 8, 1858) that his first bill (hereinafter referred to) allowing the railroad to select "agricultural land" for mineral losses, was taken up in the Senate. Cong. Globe, 35th Cong., 1st Sess. 1536.

[13] S. Exec. Doc. No. 78, vol. 1, 33d Cong., 2d Sess. (1855) (Ser. No. 758), p. 107.

It was, of course, realized that poor lands would not build a transcontinental railroad especially through the mountainous region of the far west. This fact is emphasized in the committee reports of the late 40's approving the "Whitney Project."[14] These reports refer to the first 800-mile stretch as "good land" or "good agricultural lands" "or good agricultural country." The "good agricultural land" was to supply the fund with which to build the road across the "poor or uncultivable land, inadequate to that purpose."

Against this background, the reasons for striking out the standard indemnity provision requiring selections "nearest" to the road becomes perfectly clear. More than fifteen bills were reported for roads to the Pacific and none carried the standard provision,[15] but this proposed privilege of seeking good lands irrespective of proximity to the line of the road was of no avail through barren mountain regions where the only lands of value were deemed

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[14] H. Rept. No. 733, 30th Cong., 1st sess. (1848) (Ser. No. 526) p. 6; H. Rept. No. 140, 31st Cong., 1st sess. (1850) (Ser. No. 583) pp. 14, 31. S. Rep. No. 194, 31st Cong., 1st sess. (1850) (Ser. No. 565), H. Rept. No. 101, 32d Cong., 1st sess. (1852) (Ser. No. 656) p. 2; cf. S. Rept. No. 344, 32d Cong., 1st sess. (1852) (Ser. No. 631) p. 9; see also Cong. Globe, 32d Cong., 1st sess., 1274 (1852).

[15] S. 273, 33d Cong., 1st sess. (1854); H. R. 295, 33d Cong., 1st sess. (1854); S. 537, 33d Cong., 2d sess. (1855); S. 186, 34th Cong., 1st sess. (1856); H. R. 576, 34th Cong., 1st sess. (1856); H. R. 867, 34th Cong., 3d sess. (1857); S. 65, 35th Cong., 1st sess. (1858); H. R. 646, 36th Cong., 1st sess. (1860); H. R. 701, 36th Cong., 2d sess. (1860); H. R. 835,

to be mineral. A road could not be built through these difficult areas by granting "worthless lands" and to meet this problem the first mineral indemnity provision, prototype of the Northern Pacific mineral proviso, was proposed in 1858, providing that for selecting in lieu of mineral losses:

> a like quantity of unoccupied and unappropriated *agricultural lands* nearest to the line of the road, *through said mineral lands,* * * *[16]

This provision applied to the State of California where it was believed for a decade after commencement of the gold rush of 1848 that practically the only lands of value in California were mineral and that a grant there would be a "barren grant" when mineral land was excluded because one "might go fifty miles, and still find all mineral land."[17]

This idea of granting *"agricultural lands"*

36th Cong., 1st sess. (1860); H. R. 323, 37th Cong., 2d sess. (1862); S. 213, 37th Cong., 2d sess. (1862); S. 260, 37th Cong., 2d sess. (1862); S. 360, 37th Cong., 2d sess. (1862); H. R. 5, 38th Cong., 1st sess. (1863); H. R. 483, 38th Cong., 1st sess. (1864). Prints of these bills as introduced, reported, etc., are to be found in the bound collection of the Library of Congress and in the House library. Generally, they are only paraphrased in the Congressional Globe.

[16] S. 65, 35th Cong., 1st sess. (1858); cf. H. R. 411, 35th Cong., 1st sess. (1858).

[17] Senator Latham of California on January 17, 1861 (Cong. Globe, 36th Cong., 2d sess. 431; see also bill granting 40 miles on each side of the road in California and 20 elsewhere, introduced by Senator Gwin, August 30, 1852, Cong. Globe, 32d Cong., 1st sess., 2466).

wherever they could be found nearest to the road *through mineral areas* reappears regularly thereafter as a means of getting the transcontinental roads constructed through the barren mountain regions.[18]

The chief obstacle to the passage of a Pacific railroad bill through the 50's was sectional strife over whether a northern, a central, or a southern route should be adopted. The first to succeed was the Union Pacific-Central Pacific of July 1, 1862, with a subsidy of over $100,000,000.[19] With no more money forthcoming for another Pacific railroad, champions of the northern route proposed a grant of land so large that money would not be necessary.[20]

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[18] S. 65, 35th Cong., 1st sess. (Foote's substitute of January 28, 1858); S. 65, 35th Cong., 1st sess. (Doolittle's substitute of December 14, 1858); S. 65, 35th Cong., 1st sess. (Doolittle's substitute of January 7, 1859); S. 65, 35th Cong., 1st sess. (Bigler's substitute of January 12, 1859); H. R. 411, 35th Cong., 1st sess. (1858); S. 12, 36th Cong., 1st sess. (1859); H. R. 701, 36th Cong., 2d sess. (1861) (print of February 1, 1861, showing Senate amendment for branch road to Portland); H. R. 364, 37th Cong., 2d sess. (Doolittle's amendment of June 11, 1862); S. 360, 37th Cong., 2d sess. (1862); H. R. 5, 38th Cong., 1st sess. (1863); H. R. 483, 38th Cong., 1st sess. (1864).

[19] Act of July 1, 1862, c. 120, 12 Stat. 489.

[20] Senator Doolittle's amendment of June 11, 1862, Cong. Globe, 37th Cong., 2d sess. 2659 (1862) and his bill of June 20, 1862 (S. 360), passed by Senate June 26, 1862, Cong. Globe, 37th Cong., 2d sess. 2941; Representative Thaddeus Stevens, December 14, 1863, H. R. 5, 38th Cong., 1st sess. (1863), Cong. Globe, 38th Cong., 1st sess. 2297 (1864).

The bill (H. R. 483) which was to become the Northern Pacific grant, finally passed the House on May 31, 1864, with the same provision as Senator Gwin had proposed in 1858, authorizing selection in lieu of mineral losses of—

> a like quantity of unoccupied and unappropriated *agricultural lands* nearest to the line of the road, *through said mineral lands,* * * *[21]

Under attack of those championing homestead rights, the provision giving "agricultural lands" for mineral indemnity was stricken out entirely in the Senate,[22] and "mineral lands" were then defined so as to exclude coal and iron. In this shape the bill passed the Senate on June 27, 1864, and was sent to a conference committee [23] of the two houses, including Senator Doolittle and Representative Thaddeus Stevens, two ardent champions of the Northern Pacific Railroad. The final conflict of opinion over the mineral indemnity provision is buried in the Committee's discussion, of which no report exists, but friends of the railroad restored the mineral indemnity provision as it appears in the act today, with a limitation inserted, however,

[21] Cong. Globe, 38th Cong., 1st sess. 2612 (1864).

[22] Cong. Globe, 38th Cong., 1st sess. 3290 (June 27, 1864).

[23] The Conference Committee Report was signed by J. R. Doolittle, Isa. Harris, and J. W. Nesmith, managers on the part of the Senate, and Thaddeus Stevens and I. Donnelly, managers on the part of the House (Cong. Globe, 38th Cong., 1st sess. 3459).

confining selections to *"within fifty miles of the road."* Also, the phrase *"through said mineral land"* was stricken out, doubtless in recognition of the impracticability of determining when the road was passing through mineral land. But in departing from the act, this phrase nevertheless leaves very clear the original purpose of the proviso to give *"agricultural lands"* where they could be found, in lieu of mineral losses through mountainous areas where the principal lands of value were considered to be mineral. For valuable lands lost, the only other lands of value would be given—agricultural lands.

(b) *"Agricultural lands" in "mineral" areas; Mining Act of July 26, 1866, and other contemporaneous acts*

The words "agricultural lands" are to be found in no less than 19 different statutes and treaties which were enacted or ratified between 1850 and 1884, the alleged date of definite location. Since these laws are approximately contemporaneous with the act under discussion, and since they relate to the public lands, they may reflect what Congress meant when it authorized the Northern Pacific to select "agricultural lands" for mineral losses.[24]

The Mining Act of July 26, 1866, c. 262, 14 Stat.

[24] *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526; 2 Lewis' Sutherland, Statutory Construction (2d ed. 1904), sec. 443.

251, is particularly illuminating in using the terms "agricultural lands," "mineral lands," and "lands not mineral" as was done in the grant of July 2, 1864. The federal government's policy throughout the '40's and '50's was to reserve mineral areas, although this frequently withdrew from settlement by the agriculturists rich areas of fertile land.[25] President Fillmore, in his message to Congress in 1851, stated that he was not yet ready to recommend a definite plan for the proper disposal of mineral lands in California, but he did make the following recommendation:

> The agricultural lands [in California and Oregon] should, however, be surveyed, and brought into market with as little delay as possible, that the titles may become *settled,* and the inhabitants stimulated to make *permanent improvements,* and enter on the ordinary pursuits of life.[26]

In other words, this policy of reserving large areas as "mineral lands" interfered with the development of a permanent, agricultural population in those regions. Such a result was to be avoided. Furthermore, farm lands were at a premium in that locality. As early as 1845 Surveyors General of Ohio and Michigan, in recommending a geologi-

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[25] S. Doc. No. 16, 29th Cong., 1st sess. (1845) (Ser. No. 472) pp. 6–7; S. Exec. Doc. No. 2, 30th Cong., 1st sess. (1847) (Ser. No. 504), p. 19.

[26] S. Exec. Doc. No. 1, pt. 1, 32d Cong., 1st sess. (1851) (Ser. No. 611) p. 15.

cal survey of the Lake Superior region, pointed out the importance of farming land in a mining community, saying "between the mineral ranges in that country, there are large tracts of *good farming lands,* which have no value for mining purposes, but would sell readily to persons who would cultivate them and who would thus be enabled to supply the miners in their neighborhood with food." [27] Such a survey was urged in 1847,[28] 1848,[29] 1855,[30] 1857,[31] 1858,[32] 1861,[33] 1863.[34]

With the settlement of the Oregon boundary in the treaty with England in June 1846 and the commencement of the gold rush in 1848, the movement

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[27] S. Doc. No. 16, 29th Cong., 1st sess. (1845) (Ser. No. 472) p. 46.

[28] S. Exec. Doc. No. 2, 30th Cong., 1st sess. (1847) (Ser. No. 504) p. 177.

[29] H. Exec. Doc. No. 12, 30th Cong., 2d sess. (1848) (Ser. No. 539) p. 147.

[30] Report of the Secretary of the Interior for 1855, S. Exec. Doc. No. 1, pt. 1, 34th Cong. 1st and 2d sess. (Ser. No. 810) p. 278; also printed in H. Exec. Doc. No. 1, pt. 1, 34th Cong., 1st sess. (Ser. No. 840).

[31] Report of the Secretary of the Interior for 1857, S. Exec. Doc. No. 11, pt. 1, 35th Cong., 1st sess. (Ser. No. 919) p. 224; also printed in H. Exec. Doc. No. 2, pt. 1, 35th Cong., 1st sess. (Ser. No. 942).

[32] Report of the Secretary of the Interior for 1858, S. Exec. Doc. No. 1, pt. 1, 35th Cong., 2d sess. (Ser. No. 974) p. 307.

[33] Report of the Secretary of the Interior for 1861, S. Exec. Doc. No. 1, pt. 1, 37th Cong., 2d sess. (Ser. No. 1117) p. 540.

[34] Report of the Secrtary of the Interior, H. Exec. Doc. No. 1, pt. 1, 38th Cong. 1st. sess., Ser. No. 1181, p. 118.

to the West increased steadily and sharpened the conflict between those who sought minerals and wealth and those who sought agricultural lands and homes, increasing the demand for segregation of agricultural lands.

The Act of July 26, 1866 resulted. It granted to citizens who had settled upon and used for "agricultural purposes" land previously designated as mineral upon which there were no valuable mines, "and which are properly *agricultural lands,*" the right to acquire such tracts under the *Homestead or Preemption laws.* The Secretary of the Interior was to "designate and set apart such portions of the said lands as are clearly *agricultural lands,*" thereafter to be subject to settlement.

Two subsequent amendments [35] made it doubly clear that nothing was to defeat or impair any bona fide preemption or homestead claim upon *agricultural land,* and also permitted a mine or mill owner to patent *nonmineral land* for mining or milling purposes.

It is perfectly evident that the phrase "agricultural lands" as used in the foregoing mining acts can mean but one thing, namely, tillable fields (cultivable, *agri*). Qualified persons were permitted to acquire title to agricultural lands interspersed among the mineral surveys, even in tracts smaller

[35] The Placer Mining Act of July 9, 1870, c. 235, 16 Stat. 217, and the Mining Act of May 10, 1872, c. 152, 17 Stat. 91.

than forty acres, the minimum ordinarily allowed under the Homestead Act. Why? So that "arable lands" might be utilized by the farmers to raise the foodstuffs needed in these mining communities.

As Senator Hendricks of Indiana said on June 28, 1866—

> * * * it is of first importance that the Government s h o u l d * * * ascertain what lands are agricultural, with the view to dispose of them to the *agriculturist*. * * * I ask * * * how the *mineral lands* and the *agricultural lands* are to be separated. * * * It is a matter of fact to be ascertained what lands are mineral and what agricultural, * * *.[36] [Italics supplied.]

Neither Congress nor Surveyors General were concerned about the "barren mountain peaks" which are always found throughout mining regions. The objects of both the Senate[37] and the House[38] were as stated by Senator Hendricks.

Against this background it is quite impossible to construe "agricultural lands" as synonymous with "nonmineral land." Bearing in mind that the Mining Act of 1872 authorized entries under the Homestead Act in "agricultural lands" inter-

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[36] Cong. Globe, 39th Cong., 1st sess. 3452 (1866)

[37] S. Rept. No. 105, 39th Cong., 1st sess. (1866) (Ser. No. 1240) pp. 1, 3. Cf. debates, Cong. Globe, 39th Cong., 1st sess. 3232, 3236, 3452.

[38] H. Rept. No. 66, 39th Cong., 1st sess. (1866) (Ser. No. 1272) pp. 1, 3, 12.

spersed among mineral surveys, and also authorized a miner or mill owner to acquire title to five acres of nonadjacent "nonmineral lands" for use as a mill site, the phrase "agricultural lands" could not be construed as synonymous with "nonmineral lands." Furthermore, to do so would have invited fraud, for barren rocky tracts could have been entered by speculators as "agricultural lands" in the hope that minerals might be subsequently discovered. To avoid this, the land had to be "clearly agricultural."

Furthermore, under the Preemption and Homestead laws "cultivation" was a *sine qua non*. In the Preemption Act of May 29, 1830, every settler or occupant of the public domain who had "cultivated any part thereof" in 1829, was authorized to acquire title to not to exceed 160 acres upon paying the United States the then minimum price of said lands. Subsequent preemption statutes contain the same or similar provision requiring "cultivation," "improvement," and "occupancy" of the preempted tract.[39]

With the Homestead Act of May 20, 1862, c. 75, 12 Stat. 392, a policy of giving away the inhabitable parts of the public domain was finally settled,

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[39] See Act of June 19, 1834, c. 54, 4 Stat. 678; Act of June 22, 1838, c. 119, 5 Stat. 251; Act of June 1, 1840, c. 32, 5 Stat. 382; Act of September 4, 1841, c. 16, 5 Stat. 453; Act of August 4, 1842, c. 122, 5 Stat. 502; Act of March 3, 1843, Sec. 7, c. 86, 5 Stat. 619; Act of June 15, 1844, c. 71, 5 Stat. 671.

and the homesteader was required to state in his application that his entry was made "for the purpose of actual settlement and cultivation." Before any patent could issue, the homesteader was required to prove that he had "resided upon or cultivated the same" for five years. Unless at least a portion of the tract could be cultivated, it could not be homesteaded. "The [homestead] law insists on settlement or residence and *cultivation* for a period of five years."[40] The Commissioner of the General Land Office in 1879 made the following observations on this subject:

> In considering the reason and spirit of the homestead law, I am of the opinion that it was not the intention of Congress that *lands not agricultural in character and unfit for cultivation* should be entered * * *. Webster defines cultivation to be "the art or practice of cultivati[illegible]—improvements for agricultural purpos[illegible]—tillage—production by tillage," and in this sense must the word in its use here be understood.[41]

When Congress directed that the "agricultural lands" in the mineral regions should be set apart for homestead purposes, it could have been referring only to such lands as could be "cultivated." Worthless, barren mountain peaks could not be entered under the homestead law. Such lands were

[40] *John Wineland*, 4 Copp's Landowner 103, 107 (1877) [italics in the original].

[41] William Lamont, 7 Copp's Landowner 117 (1879).

not to be segregated. Only those which were "clearly agricultural" and which would be of some utility for the growing of foodstuffs were to be surveyed and made available to homesteaders.

A careful examination of the other 16 contemporaneous statutes or treaties [42] in which the term

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[42] Oregon Donation Act of July 17, 1854, c. 84, sec. 5, 10 Stat. 305 ("good agricultural land" for orphans); Treaty with Chastas of November 18, 1854, 10 Stat. 1122 ("agricultural lands" on reservation to be surveyed, "same" to be divided into "small farms"); Act of March 3, 1863, c. 119, 12 Stat. 819 (80 acres of "good agricultural lands" for each Sioux "willing to adopt the pursuit of agriculture"); Nevada Enabling Act of March 21, 1864, c. 36, sec. 10, 13 Stat. 30 (proceeds from "public lands" to be used for "the irrigation of the agricultural land in the State"); Colorado Enabling Act of March 21, 1864, c. 37, sec. 10, 13 Stat. 32 (same as Nevada Enabling Act); Act of February 23, 1865, c. 45, 13 Stat. 432 (act to extinguish Indian possessory title to "agricultural and mineral lands" in Utah); Atlantic and Pacific Railroad Act of July 27, 1866, c. 278, 14 Stat. 292 (similar to Northern Pacific grant); Texas Pacific Railroad Act of March 3, 1871, c. 122, 16 Stat. 573 (similar to Northern Pacific grant); Act of March 3, 1873, c. 283, 17 Stat. 609 (allowing joint entry by preemption settlers when "settlements" have been made upon "agricultural public lands"); Shoshone Act of December 15, 1874, c. 2, 18 Stat. 291 (no intrusion by whites upon the "agricultural or other lands" of the Shoshones); Act of March 3, 1875, c. 139, 18 Stat. 474 (proceeds from sale of "agricultural public lands" to be used for internal improvements); Act of May 5, 1876, c. 91, 19 Stat. 52 (mineral deposits in Missouri and Kansas to be "subject to disposal as agricultural lands"); Act of March 3, 1879, c. 192, 20 Stat. 472 (providing for final proof by homestead settlers on "agricultural lands"); Act of June 15, 1880, c. 223, 21 Stat. 199 ("agricultural lands" to be set

"agricultural lands" is used shows clearly that all of the acts in question "make sense," and their purposes become apparent, if the phrase be construed to mean only those lands which are tillable, whereas the company's contention that it means nonmineral lands frequently leads to absurdities.

Since it is to be presumed, in the absence of other evidence, that the phrase was used in each act to express the same idea, the term should be consistently interpreted. It is not logical to suppose that Congress in one act used the term as synonymous with "nonmineral lands," and in the next act as meaning "farm lands."

(c) *Construction of "agricultural lands" in the mineral proviso, by the Department of the Interior.*

In the court below the company relied heavily upon what it asserted to be the "settled practice" of the Department of the Interior, General Land Office, charged with the administration of railway grants. The company contended that indemnity selections for mineral losses have always been allowed in "nonmineral lands" with no regard to

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apart for Ute Indians, "said lands" to be allotted in severalty "with an additional quantity of grazing land"); Act of April 11, 1882, c. 74, 22 Stat. 42 (similar provision for Crow Indians); Act of March 3, 1883, c. 118, 22 Stat. 487 (mineral deposits in Alabama to be "subject to disposal only as agricultural lands").

whether or not such lands were, in fact, "agricultural lands."

It is true that all nonmineral lands were open to settlement and since the only lands having any possible interest to settlers were agricultural lands, the nonmineral lands were sometimes loosely referred to as "agricultural lands." This nomenclature was sometimes used in the Department as brought out by then Assistant Attorney General Van Devanter in *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1 (1898), in which the question had arisen whether a particular tract could be homesteaded. A part of the opinion reads as follows (pp. 11–12):

> The field notes of these surveys return the land along the west line of this section as "level, soil first rate, bunch grass," * * * and along its north, east and south lines as "mountainous, soil 3rd rate" * * *. This is a *nonmineral return* and in the *nomenclature* of the land department is usually designated as an *"agricultural" return* to distinguish it from a "mineral" return.

This "nomenclature" developed very naturally in the Land Office during the period when land was first being offered for sale in the Middle West and surveys were confined to that region in which lands were in fact either "mineral" or "agricultural." Almost all "nonmineral land" could in this area be

entered and cultivated under the Homestead laws as "agricultural land." [43]

However, when a true question of land classification arose, the Departmental and Congressional reports leave no doubt whatever that "agricultural lands" and "nonmineral lands," were not synonymous. For example, in 1869 a request was sent from the General Land Office to the Surveyors General of each western state requesting them to supply information about the quantities of "mineral lands," "grazing land," "agricultural land," "timber land," etc., and the quantity of railroad mileage in their respective states or territories. The information received was published in the annual report of the Department of the Interior for 1869, the following excerpts being typical:

> The number of acres of *mineral land* in Montana is estimated at 9,200,000; of *agricultural land,* 23,000,000; of *grazing land,* 69,000,000; of *sterile land,* which may be reclaimed by irrigation, 23,000,000; broken by *mountain ranges,* 46,008,320; of timber, 11,502,320. There are 63 cities and towns. The length of the proposed Northern Pacific Railroad running through the Territory will be seven hundred and forty miles." [44]

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[43] Cf. H. Misc. Doc. No. 55, 45th Cong., 2d sess. (1878) (Ser. No. 1818), p. 1.

[44] H. Exec. Doc. No. 1, pt. 3, 41st Cong., 2d sess. (1869) (Ser. No. 1414) p. 162; see also p. 355, where the original table of Surveyor General Washburn is printed. Overlapping categories account for the excessive total acreage.

> The total area of Idaho is approximately estimated to contain, of *agricultural lands* 16,925,000 acres; *grazing,* 5,000,000; surface of lakes 575,000; sterile lands, producing no other vegetation than wild sage and occasional tufts of buffalo grass, but principally reclaimable by irrigation into excellent pasture and agricultural land, 14,328,160; *mountain lands* 18,400,000 embracing 7,500,000 acres of *timber lands* and 8,000,000 of *mineral lands.*[45]

In a report made in 1872, the House Committee on the Pacific Railroad used the following language in describing the Northern Pacific land grant:

> Thorough and careful surveys made during the past eighteen months by the company's engineers, covering nearly the entire distance from Lake Superior to Puget Sound, leave absolutely no room for doubt that the *company's lands, agricultural, grazing, mineral, and timber,* are of *excellent average quality.*[46]

And in 1878, Lt. Wheeler, who was then in charge of United States geographical surveys west of the one hundredth meridian, submitted the following land classification figures to the House Committee on Public Lands:

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[45] H. Exec. Doc. No. 1, pt. 3, 41st Cong., 2d sess. (1869) (Ser. No. 1414), p. 168.

[46] H. Rept. No. 99, 42d Cong., 2d sess. (1872) (Ser. No. 1543), p. 4.

States or Territories	Agricultural lands		Timber		Grazing		Arid or barren		Total areas in sq. miles
	Sq. mi.	Percent	Sq. mi.	Percent	Sq. mi.	Percent	Sq. mi.	Percent	
Colorado	1,043	7.9	5,906	44.8	3,686	27.9	2,557	19.4	13,192
New Mexico	956	5.1	7,030	37.9	9,226	49.7	1,352	7.3	18,565
California	67	1.5	430	9.7	2,133	48.2	1,791	40.6	4,420
Arizona	796	4.4	2,614	14.6	7,154	39.2	7,388	41.1	17,952
Total	2,862	5.3	15,980	29.5	22,199	41.0	13,088	24.21	[47] 54,130

In administering the railroad grants in the Department of the Interior, the question as to whether "agricultural lands" included barren mountain peaks was an academic one so long as there were good lands in the indemnity belt. The only requirement of the General Land Office as to the character of the lands selected, was an affidavit from the railroad company with each selection list, to the effect that the land selected was unoccupied, unappropriated, nonmineral land within the terms of the grant. It could be taken for granted that the company was taking the best lands and not asking for worthless lands. Since the company under one indemnity clause or the other could select almost any kind of nonmineral land it desired, including timber lands and coal and iron lands, there was little need to scrutinize these lieu selections once it was ascertained that they were unoccupied, unreserved, and nonmineral.

[47] H. Misc. Doc. No. 55, 45th Cong., 2d sess. (1878) (Ser. No. 1818) p. 7.

The role of the Land Office was largely passive. In the administration of scores of land grants a standard affidavit to the effect that the lands were vacant, nonmineral and not interdicted by the act was accepted by the Department of the Interior, General Land Office, and this was likewise done in the administration of the 40,000,000 acres granted to the Northern Pacific (Narrative Statement, p. 396) even though the indemnity clauses of that act did not follow the Illinois Central pattern.

Unless the selection lists filed conflicted with prior reservations, claims and withdrawals as shown by the Department records, or unless the selection was contested by some interested party, the list was approved as a matter of course. With over a billion acres of public lands to administer, and many land grants, there could be no gratuitous classification of indemnity land by the Department of the Interior, and there was no need for classification, for there were plenty of good lands available and the self-interest of the applicants dictated selections in good farming lands. There was never an occasion to consider the exact scope of the term "agricultural lands" until after 1900 when lands became scarce.

The first contest arose in 1910 when the company selected, as indemnity for mineral losses, lands which had been reserved as coal lands. The selection was disallowed and it was held that "reserved

coal lands" were not "agricultural lands" within the meaning of the mineral proviso.[48]

No settled practice can be shown even after 1910 and 1911, a fact brought out during the hearings of the Joint Committee of Congress, authorized by the Resolution of June 5, 1924, when a letter of inquiry was addressed from the Committee to the Secretary of the Interior as to whether lands such as are here in controversy could be selected as "agricultural lands." Mr. E. C. Finney, Assistant Secretary of the Interior, replied on May 6, 1925, that he found "no specific ruling" on what constituted "agricultural lands" (Narrative Statement p. 402, unprinted J. C. R. 2529), although he recognized that unoccupied, unappropriated, nonmineral lands could be taken "whether as a prerequisite to cultivation they had first to be cleared, drained or irrigated."

It is significant to note here that Mr. Kerr, counsel for the Northern Pacific Railway Company throughout the congressional hearings repeatedly

[48] See *N. P. Ry. Co.*, 39 L. D. 314, (1910). The omission of the words "within fifty miles of the road" from the printed Statutes at Large of 1866 was not noticed by the General Land Office until 1911. In that year the Department of the Interior asked the Attorney General which should control—the published Statute, omitting the phrase, or the enrolled act, including the phrase, 29 Op. A. G. 498. As recently as 1919 the act was incorrectly quoted, *Northern Pacific Company* v. *McComas*, 250 U. S. 387, 389 (1919).

conceded that "agricultural lands" had to be capable of cultivation."

It is clear that the practice of the Land Office alleged to constitute a settled construction of the phrase "agricultural lands" disappears upon examination. The matter is an open question with no specific ruling of the Department and with a seeming concurrence of the Department of the Interior and the then counsel of the Northern Pacific Railway Company during Congressional hearings that the lands must be capable of cultivation.

Errors of the special master

The special master felt the weight of the foregoing arguments, and in order to meet them adopted an ingenious theory never before advanced by counsel for the railroad, or anyone else, during the Congressional hearings or the proceedings in this case. After pointing out that the railroad, under the general indemnity provision, could select "other lands" including "coal and iron" lands, inasmuch as "coal and iron" were not "minerals," as defined in the Northern Pacific grant; he said that *"for some reason"* Congress did not want to permit the selection of "coal and iron" lands for mineral losses. Congress, to indicate that desire, used the term "agricultural lands" in the mineral indemnity proviso to mean nonmineral, noncoal, and noniron (R. 456).

" J. C. R. 2538, et seq., 4120.

Not even the special master could assign a reason for seeking this result, but by this device he attributed a different meaning to each of the two indemnity provisions. There are palpable errors in this conclusion:

"Agricultural lands proviso" antedates "coal and iron proviso." The first bill allowing selection of agricultural lands for mineral losses was reported in 1858 (supra, p. 74) and in the succeeding session of Congress bills containing similar indemnity clauses were introduced (supra, p. 75, n. 18), but in not one single bill was "coal and iron" mentioned. Minerals, including coal and iron, were reserved to the Government, and for mineral losses the grantee could select "agricultural lands." Clearly "agricultural lands" was not used to indicate that for mineral losses any nonmineral, noncoal, and noniron land could be selected, because coal or iron could not be selected in any event under these bills.

The provision allowing the Northern Pacific Railway Company to take "coal and iron," contrary to the usual rule which would reserve all mineral lands to the Government, made its first appearance when offered as an amendment on the floor of the Senate in 1864,[50] after the mineral indemnity proviso had been stricken out. It was only in the joint committee hearings that the mineral indemnity provision was reinstated in the bill as finally

[50] Cong. Globe, 38th Cong., 1st sess. 3290 (1864).

adopted, wholly without reference to the "coal and iron" provision.

In the light of these facts it is impossible to conclude, as the master has done, that the term "agricultural lands" was placed in the act so that the company would not be able to select "coal and iron" lands as indemnity for mineral losses.

Absence of reasons for excluding "coal and iron" from mineral indemnity selections: In reserving mineral lands to the government in the Act of 1864, Congress so defined minerals as to exclude "coal and iron" so that the railroad could take coal and iron lands not only in the place limits, but also in the indemnity limits. Why then should Congress, having expressed its intention that the railroad company should have "coal and iron" in the place and indemnity limits for general losses, suddenly decide that such lands could not be secured as indemnity in satisfaction of mineral losses?

Yet the special master says that "for some reason" this is what Congress intended. Even he cannot suggest the reason, and the railroad submitted none. The conclusion of the special master is in conflict with the conclusion to be derived from the general indemnity clause. According to the master's construction, in satisfaction of relatively valueless lands, such as might be embraced in an Indian reservation in the place limits of the grant, the company could select in indemnity lands valuable "coal and iron" lands, but could not

select "coal and iron" lands as indemnity for highly valuable mineral lands lost to the company in the place limits.

The master's construction falls of its own weakness in view of the real purpose of Congress to grant to the railroad company the most valuable lands it could give in lieu of mineral losses in the mountainous areas. "If these lands be valuable it is because they are mineral lands—those which the Government has not been willing to give."[31] The only other valuable lands were "agricultural lands" capable of cultivation. In lieu of these valuable mineral lands Congress gave the most valuable lands available through these mountain regions—to wit, "agricultural lands" or lands capable of cultivation.

Ambiguities resolve against the grantee

The foregoing statutes prove what the special master himself recognized in saying: "Concededly, the term 'agricultural lands' may be read in the sense the Government attaches to it." (R. 457.) It is unnecessary to quote extended authority, or to discuss exhaustively the elementary rule that any ambiguity must be resolved in favor of the grantor, where the phrase, if so construed, will not defeat the purposes of the grant. *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 326; *Leavenworth*

[31] Speech by Senator Wilson, Cong. Globe 35th Cong. 2nd sess. (1859) 375.

Railroad Co. v. *United States*, 92 U. S. 733, *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 23 How. 66, 88.

4. The court erred in holding that the company was entitled to compensation for loss of indemnity selections although it had failed to perform the condition expressed in the grant requiring it to complete the whole railroad

Section 8 of the Act of July 2, 1864, c. CCXVII, 13 Stat. 365, 370 (App. 47), provided: "That each and **every grant, right, and privilege** herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, **upon and subject to the following conditions,** namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and **complete the whole road** by the fourth day of July, anno Domini eighteen hundred and seventy-six." [Type not heavy in original.]

By a subsequent resolution the time for completing the whole road was extended to July 4, 1879. It expired on that date (R. 22, 264). This road has never been completed. The last construction was in 1887. The United States alleged these facts in subdivisions XIV (R. 23) and XXVI (R. 49) as a defense to the company's claim. Both these subdivisions were striken from the complaint, erroneously it is submitted.

The company was well aware, and so stated to Congress, that its completion of the whole road was a condition of the grant. H. Misc. Doc. No. 272, vol. 5, 43d Cong., 1st sess. (1874), p. 6. The company's claim of a right to the compensation which has been awarded for 1,453,061.02 acres of indemnity lands rests fundamentally upon the proposition that the United States in retaining indemnity lands for the forest reserves has failed to perform an executory obligation to permit the company to select such lands. Despite its admission that it has neither definitely located nor built the main line of 225 miles from Wallula to Portland (R. 23, 52, 191,220), erroneously (R. 593) stated in the complaint as 215 miles, the company virtually alleges that it has performed its contract.

When construction was begun the whole railroad was shown indefinitely by route maps filed by the company. It consisted of (1) a main line from Lake Superior to the valley of the Columbia River, thence by way of that valley to Portland, and thence to Puget Sound, and (2) a branch from a point on the main line, later known as Pasco, to Puget Sound at Tacoma. This main line and branch conformed indefinitely to the route designated by the Resolution of May 31, 1870, 16 Stat. 378, *supra*, p. 12. The main line comprised 1,741.48 miles from Lake Superior to Wallula; 225 miles from Wallula to Portland and 142 miles from Portland to Tacoma, a total of 2,108.48 miles. The only part of

this designated main line ever built which has turned out to be main line in fact is only 1,741 miles long and ends at Wallula, 367 miles short of the required terminus for the main line. Its mileage is less than 83% of the main line required. The branch built from Pasco to Tacoma is about 154 miles. The total mileage of the combined main line and branches actually built is only about 2,037 miles, or about 90% of the total required by the granting legislation.

In the light of these facts the statement made on pages 9 and 10 of the company's brief in No. 477 that "It is undisputed that the United States has received and is still receiving in full the consideration for the grant" is unwarranted and is contrary to the stricken allegations of the complaint (R. 23, subd. XIV; R. 53, subd. XXVI). The statement by the master (R. 274) that the line was opened up in 1883 to Portland, thence to Puget Sound, does not mean that it was opened up over a railroad built by this company. (R. 269). This company used the railroad of the Oregon Railway and Navigation company from Wallula to Portland (N. P. Ex. 71, R. 722).

Although the main line from Portland to Tacoma was built originally as a part of a main line, it turned out to be only a north and south branch of the required branch from Pasco to Tacoma.

The company must show that it has performed the condition of completing the road not only be-

ause that condition was expressed in the Act but also because the company had affirmatively contracted to do the things required of it by the Act. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 680; *Wisconsin Central Rd. Co.* v. *Forsythe*, 159 U. S. 46, 56; *Broder* v. *Water Co.*, 101 U. S. 274, 276; *State* v. *Hartford and New Haven R. R. Co.*, 29 Conn. 538 (1861). It has failed to show that that condition has been performed. On the contrary, it is apparent from the allegations of the complaint, uncontradicted by any allegation of fact made by the company, that there has been a breach of the condition in the company's failure to build the complete road required, a breach which was substantial and went to the essence in more ways than mere linear deficiency.

The land grant of 1864 was made as one whole grant in return for a complete railroad

In the Act of 1864 Congress authorized the company to build "a continuous railroad" (Section 1, *supra*, p. 11). As that Act was supplemented by the resolution of 1870, *supra*, p. 12, one continuous railroad was to run from Lake Superior by way of the valley of the Columbia River to Portland and thence to Puget Sound. A branch from that main line was to run from a point which was fixed later at Pasco, to Tacoma. The right-of-way given to the company was for "a railroad," this one whole railroad (Section 2, App. 39), and Con-

gress made but one grant of land. This land was to be definitely fixed by "a plat" to be filed at one time in the General Land Office (Section 3, App. 41). The titles were to be ascertained at "said time," one time and not several, and after the filing of the one required plat, patents were to be delivered for installments of the one grant as rapidly as sections of the road were completed (App. 42).

For the right-of-way for this one railroad the company was not required to pay anything to the United States. Consequently it could be foreseen that the railroad would be worth to the company fully as much as it cost the company to build it. As a bonus, in addition to the right-of-way, the United States gave to the company one huge grant of land in return for the complete railroad.

Although patents were to issue to the company for place lands within this one grant as rapidly as sections of the road were completed, Congress said nothing about the time when the United States would permit the company to select indemnity lands (App. 35–51). After it had filed its one definite location of the whole road, the company was permitted to select as indemnity for lands excepted from the grant at any part of the road, lands from indemnity limits opposite that part or any other part of the whole road. Thus the plan embodied in the Act shows that the transaction was not a sectional affair. The United States was to get the

benefits of the complete railroad in return for the entire grant of land. Until the definite location of the road was filed neither the land which was granted nor the land from which indemnity selections were permitted could be identified, and, except for the provision for delivery of patents for the place lands in installments, there would seem to be no question that the company could acquire no right to patents for any of the land until it had completed the whole road. As an original question it would seem that even this installment delivery was not required until the whole tract had been defined by the filing of the definite location of the whole road; and the Act contains no statement that Congress intended the United States to be obliged to permit indemnity selections until the whole road was not only definitely located but completely constructed. Even if it could be assumed, in the absence of such a provision, that Congress intended to permit any indemnity selections before the whole road was definitely located, there can be no doubt that Congress did not intend to permit indemnity selections after it had been established that the company not only had failed to complete the whole road but was never going to complete it. It would be idle to permit a selection and issue a patent and then forfeit the patent for a breach of condition which had occurred before the selection had been made. The land grant considered in *Cedar Rapids &c. Railroad* v. *Herring*, 110 U. S. 27, 39, had been

made subject to the completion of the railroad. In that case the Court said: "We are of opinion that no right of selection in any of these lands accrues until the entire line of the road to be built has been established by the company, and filed in the General Land Office at Washington."

After the breach of the condition requiring completion of the road, there was no right to make further indemnity selections

To defeat the company's claim it is not necessary to say that no right of selection arose before the filing of the definite location for the whole road or before completion of the whole road. It had become evident before the forest reserves were set up that the company had not completed the whole road and did not propose to do so. Ten years had elapsed since the last construction and at no time had the company made any selection from the land which became a part of the forest reserves. In essence the company's claim is: We have not performed the express condition of the grant; we have not performed our contract and we are not going to perform it; we have no excuse for not performing it; our breach is intentional and deliberate; yet we insist that the United States is obligated to permit us to select the land which it said that it would give to us only if we completed the whole railroad, which was the object for which the land was to be given. Plainly such a claim is without foundation. Yet the court overruled the objection

of the United States that the failure to complete the road barred the company from the right of selection (R. 595, para. d, 593, 592, 584, 576, exc. LVIII (b)). Overruling it, it is submitted, was error. In *Printing House* v. *Trustees*, 104 U. S. 711, 727, this Court said: "* * * where contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation to contribute is discharged."

The United States does not ask to have anything returned. The company has received none of the lands on which it bases its claim for compensation. Rather, its claim rests upon lands which had not been selected at the time when it became evident that it was not going to complete the whole road and which had not been selected at the time when the United States announced its intention to keep the lands for reserves. No right to select them had arisen because the company had not completed the whole road. Nor had it attempted to exercise its selection right. It had nothing to forfeit.

Even if it had, it was not for the court to relieve the company from the condition which Congress had imposed. In *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, a water company had gone far toward performance of its contract with a city to provide a water plant and a continuing water supply but had not completed the job. In denying the company and its mortgagee any remedy this

Court said (p. 663): "A consideration of the consequence to creditors of the contracting company is not an answer to the legal rights of the city. Considerations of hardship cannot prevail to set up and enforce a broken agreement, which in law results in giving to the opposite party a right to treat the agreement as ended."

But plainly there has been no hardship to the company in the outcome of this transaction. It has received almost 40,000,000 acres (R. 642) in lands patented before suit, together with additional lands to be patented under the portion of the decree in this case not subject to appeal. This is 90% of all it would have received had it definitely located and completed the whole road. Including the main line and branches, it has completed only 90%, and the main line is less than 83% of the main line required by the Resolution.

The company's breach wholly defeated the essential object of the grant

Congress never intended to give any land grant for a main railroad from Lake Superior to Wallula, Washington. A railroad through from Lake Superior to two Pacific ports was the essential object of the gift.

Before the company began to build and before it even filed a map of general location, Congress had said that if the company would build a main line from Lake Superior to Portland and thence to

Puget Sound, with a branch from the main line to Puget Sound, the company could have this single huge grant of public lands.

Portland was of importance in the project as a Pacific port. The company knew this and repeatedly made use of it with Congress. The first formal report of the company, S. Misc. Doc. No. 9, 40th Cong., 2d sess. (1867), pointed out the industrial, political, and military advantages of these two tidewater outlets. Included was the report of the Engineer-in-Chief of the Railroad, expressing the contemporaneous views of the importance of both outlets (p. 38): "In a memoir on this subject published in 1853, to which reference is made for many important facts and statements bearing upon this subject (statements the more valuable because given without prejudice or bias in favor of any particular route for the road), I ventured the opinion that 'upon the Columbia or upon the waters of de Fuca will yet arise the Queen City of the Pacific. Wherever that emporium is to be, whether at the mouth of the noble Columbia, or on one of the beautiful bays that open out upon the strait of de Fuca, a high destiny awaits it.' Subsequent investigations, and a more accurate knowledge of the entire country, strengthen the conviction of the correctness of this opinion. Governor Stevens states that the waters of Puget Sound form 'a great inland sea, unsurpassed on the shores of all the oceans for the purposes of commerce'; that 'these waters, in con-

nection with those of the Columbia and the main coast of the Pacific ocean north of the Columbia, and the adjacent country, are a second New England, having all the elements for a great variety of pursuits, and for a most extensive commerce.'"

Congress designated the route by way of the Columbia River to Portland for the main line. It knew the anticipated benefits of that line and that terminus, including their industrial and military advantages. They far exceeded any advantage of a railroad to Wallula. Only a year before the Resolution of 1870, Congress, on April 10, 1869, had said that for a branch between Portland and Tacoma the company should have no land outside its right of way, *supra*, p. 12. Because the road stopped at Wallula the United States was deprived of the whole 367 miles of main line from Wallula via Portland to Puget Sound. Congress had no intention at any time of giving the company land subsidies for a branch line from Tacoma to Portland.

However, as the decree now stands the company is permitted to keep, without any charge in the accounting, 1,601,338.82 acres already patented and to receive in addition compensation for 155,727.84 indemnity acres opposite that branch (R. 642–643, 634, 613–614).

For the land already conveyed the United States has not received what it expressly required in return for the grant. To require it in these cir-

cumstances to pay compensation to the extent of 1,453,061.02 acres on the ground that it had not performed an executory obligation which never became due (R. 642) is unjust. Even before the forest reserves were set up the company had no right to compel the United States to permit these selections. Whatever right the company might have earned had been destroyed, not by the Act of June 25, 1929, but by its own failure to perform the condition necessary to the existence of the right.

The master erred as to the general forfeiture act

The master approached this subject as if the United States were trying to get back lands to which the title had passed to the company subject to a condition subsequent (R. 287, 383). That is not the case. None of the 1,453,061.02 acres for which the company has been awarded compensation (R. 642) were place lands. The United States had full title to them before the forest reserves were established and has retained it without change. *Humbird* v. *Avery,* 195 U. S. 480, 508; *Southern Pacific Railroad Co.* v. *Bell,* 183 U. S. 675, 687, 689; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 392, *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51. These lands were retained for the forest reserves between 1898 and 1907 (R. 608–615). They were not withdrawn in the sense of being recalled from anybody. No change in title or possession

occurred. Their withdrawal amounted merely to an assertion by the United States that no entry could be made on them.

The company is asking compensation (R. 248) on the basis of its claim that the United States has failed to perform an executory obligation to permit selection of lands which, in 1898 and thereafter were in indemnity limits. The United States was not obliged to assign any reason for declining to permit selections if the company had no right to make them. Cf. *College Point Boat Co.* v. *United States*, 267 U. S. 12, 15–16. The master, however, assumed that the matter before him involved the forfeiture of an existing right of the company's rather than a defense by the United States against the assertion of a claimed right which the company had never exercised. Accordingly the master said that the General Forfeiture Act of September 29, 1890, 26 Stat. 496, forfeiting land grants opposite unconstructed railroads generally confirmed the purpose of Congress not to require the Northern Pacific to forfeit rights under its grant because of its failure to observe the condition as to the time of completion (R. 385).

This is plainly not the effect of that Act. Moreover, the Act does not bear on the question presented by the facts alleged in the stricken subdivisions, XXVI and XIV.

In *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 6, this Court held that the General Forfeiture Act did not forfeit any lands opposite the

unconstructed road between Wallula and Portland because, for lack of definite location, no title had vested. The earlier decision in *United States* v. *Oregon &c. Railroad Co.*, 176 U. S. 28, 49, was to the same effect. This Act was a general forfeiture act, by its terms applicable not to the Northern Pacific alone, but to all railroad land grants. Its operative language was simply (sec. 1): "There is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation." Rights-of-way were excepted. It expressed no waiver. It did not purport to relinquish any right of the United States. It has no significance here.

First, *ex vi termini*, it applies only to lands, title to which has passed, that is, lands as to which title may be "resumed." This could mean only place lands where maps of definite location had been filed, and possibly indemnity lands already selected. It could have no reference to unselected indemnity lands to which no title had passed.

Second, this general Act had no application to the Northern Pacific Railroad, or to the Wallula-Portland line. No map of definite location had been filed. No lands had passed. There was nothing to forfeit.

Third, Congress expressed no intention to waive any existing rights by the Forfeiture Act. Congress does not act by silence. *United States* v. *Pan-American Petroleum Co.*, 55 F. (2d) 753, 773 (C. C. A. 9, 1932), certiorari denied, 287 U. S. 612.

The express condition that the company must complete the whole road was part of the granting Act. Such Acts "are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed." *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 427. No subsequent act declares or implies any intention to repeal the condition and thereby to surrender established public rights. *United States* v. *Pan American Petroleum Co., supra.* There is no basis for asserting that by declaring a forfeiture applicable to other railroads and resuming title to lands which had passed to them, Congress thereby waived and relinquished the accrued right of the United States to refuse additional indemnity land to the defaulting Northern Pacific Railroad Company. *United States* v. *Oregon &c. R. Co.*, 186 Fed. 861, 869, semble.

The Act of September 29, 1890, c. 1040, sec. 5, 26 Stat. 496, 498, contains a proviso saving to the City of Portland a right-of-way for an aqueduct which the company had purported to convey. This clause, enacted for the protection of the city, did not involve any recognition that there was any title in the company to be forfeited by the Act. The legislative history of that Act shows the only

reason why it did not contain an express declaration that it should not be construed to waive or release any right of the United States to have other lands granted by the United States forfeited for failure to comply with the conditions of the grant. The reason was that such a provision was deemed unnecessary simply because no such waiver or release was implied by the Act (21 Cong. Rec., pt. 11, p. 10422, 1890; 21 Cong. Rec., pt. 4, p. 3771, 1890).

There is nothing in this Act to suggest an intention on the part of Congress to deprive the United States of its right to insist on the ground that the company has failed to complete the whole main line by way of the Columbia River valley west of Wallula to Portland and thence to Puget Sound, that it cannot select additional indemnity land by building from Lake Superior only to Wallula and stopping there, 367 miles short of Puget Sound. By the contemplated line, the company failed to perform the condition imposed by Congress to any right to select. The breach was substantial and went to the essence.

Because of its failure to complete the whole road the company cannot show any deficiency on March 1, 1898

If by the time the forest reserves were established, the company's breach of condition in failing to complete the whole road had not *ipso facto* destroyed any right it might have had from having any right to select indemnity lands certainly it

should not be in a better position than it would have been if it had fulfilled the condition by completing the whole road. The court, over the objection of the United States (R. 595, Para. (d), R. 656, Assignment 40), has computed the deficiency of surveyed lands left outside the forest reserves as if the company by constructing the part of the road which it did construct had fully performed its contract. The court disregarded entirely what the effect might have been if the road had been definitely located and constructed from Wallula to Portland. If that had been done there is no probability that there would have been any deficiency, for the construction of that part of the required road would have added lands available for indemnity selection, the amount of which it is impossible to measure but which undoubtedly would have been enough to satisfy the claims asserted by the company in this respect. The claimed loss of selection rights for which compensation is awarded was based largely on asserted mineral losses. Therefore, it becomes necessary, in order fully to determine what the company's situation would be if it had completed the whole road, to know what acreage would have been available, opposite the line from Wallula to Portland, to satisfy mineral losses. By the Act of July 2, 1864, sec. 3, 13 Stat. 365, *supra*, p. 11, the company, in order to satisfy mineral losses, could resort to lands in the first indemnity limits within 50 miles on either side of the road anywhere along the line, irrespective of the point where the loss occurred. Mineral

losses in Montana could be satisfied from indemnity lands in Oregon. Accordingly, until it is known what lands would have been available in the first indemnity limits in Oregon if the company had completed the whole railroad, no deficiency is established.

The provision of the Resolution of May 31, 1870, *supra,* p. 13, limiting second indemnity selections to the state or territory where the subsequent losses occur did not reduce the right, previously given, to go beyond the state or territory to select from first indemnity limits.

It can never be known what quantity of land would have been available in Oregon to satisfy mineral losses if the road had been built from Wallula to Portland. There might have been as much as 2,160,000 acres. Nor can it be shown on which side of the river the company would have built the road from Wallula to Portland. The indefinite general maps filed in 1870 and 1872 (R. 50) show a proposal to locate the road across the Columbia River north of Wallula (Map opposite page 8, Sen. Exec. Doc. No. 254, 50th Cong., 1st sess., September 1, 1888). However, the definite location filed October 4, 1880 (R. 52), did not cross the river at the point indicated but instead continued on the left bank to Wallula toward a line on the south side of the river. Thus it does not appear that the road to Portland would not have been constructed on the south side of the river, and therefore through Oregon. If that had been done, it is evident from Northern Pacific Ex-

hibit 131, App. 2, that the area not covered by overlaps on the branch lines from Portland to Tacoma and from Pasco to Tacoma would be fully as large as the area which would be covered by the overlaps south of the railroad. In these circumstances it is conservative to disregard only the land north of the railroad and to assume that the company would have acquired the land to the south. South of the railroad there would have been a 20-mile strip of place lands and a 30-mile strip of mineral first-indemnity lands, which together would carry to the 50-mile limit for mineral indemnity. Over the distance of 225 miles between Wallula and Portland there would be 2,160,000 acres in the alternate sections in this indemnity strip.

From these are to be deducted lands acquired by settlers or otherwise disposed of before the date of definite location. There is no basis for guessing that the area subject to these exceptions would have been large before July 4, 1879, when the railroad was required to be completed.

These uncertainties arise solely as a result of the company's breach of contract, and of the condition of the grant, in failing to file a definite location from Wallula to Portland and in failing to construct that part of the main railroad. The company should not be permitted to require the court to guess, or even to balance the probabilities, as to whether it would have constructed the line north of the river

or south of the river or, in either case, what would have been lost to settlers and others out of indemnity limits thereby established. A much more definite probability was deemed insufficient to support the claim of the United States in *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 6. The company should not be permitted to prevail by "pushing into view the rights conferred by the granting acts and putting out of view the wrongs committed by it." *Oregon & Cal. R. R. Co.* v. *United States*, 243 U. S. 549, 559.

The company seeks to recover compensation notwithstanding failure to complete the whole railroad. Yet but for that failure there is the likelihood just indicated that a large part of 2,160,000 acres in Oregon would have been available to satisfy mineral losses anywhere on the route.

In these circumstances it is plain that the company has not established that there was any deficiency on March 1, 1898, when indemnity lands were first retained by the United States for the forest reserves. Consequently, the company has not established that the withdrawal of indemnity lands for the forest reserves constituted a breach of any obligation by the United States and has failed to show that it is entitled to compensation.

5. The court erred in striking out subdivision XXVI, and therefore crediting the company with 1,400,000 additional acres opposite about eighty-two extra miles of railroad added by a route alleged in that subdivision to be unnecessarily circuitous and not the most eligible route as required by the Act of July 2, 1864.

Subdivision XXVI (R. 49–58) alleged that the Act of July 2, 1864, as modified and supplemented by the Joint Resolution of May 31, 1870, required the company to construct its main line to its western terminus upon the most direct and practicable line, without unnecessary deviations, but that the company built the railroad from Lind in Washington to Ellensburg in Washington by an unnecessarily circuitous route 82 miles longer (R. 55) than the direct route between the two points and that, by reason of this unnecessarily circuitous route, 1,400,000 acres were added to the lands within the limits described in the grant, above the acreage which would have been included in the grant had the more direct route been followed (R. 57). This circuity is shown on the second map at the beginning of the appendix (App. 3).

The master ruled that this subdivision was demurrable for reasons (R. 321–328) which, in summary, amount to a finding, based solely upon the master's own personal judgment, that its allegations were false and that the route followed was in fact the most eligible route (R. 328). This is plainly contrary to the established principle that on demurrer the allegations are to be taken as true.

Angle v. *Chicago, St. Paul &c Railway*, 151 U. S. 1, 10.

The master relied upon the assumption that the doctrine of judicial notice permitted this decision to be made on the basis of his personal information and judgment without the taking of evidence. The court adopted this reasoning and dismissed subdivision XXVI (R. 411–412).

It is submitted that this assumption, by the master and the court, of the right to determine without evidence, that the allegations of subdivision XXVI were false, is reversible error. *Leong Kim Wai* v. *Burnett*, 23 F. 2d 789, 791 (C. C. A. 9, 1928).

The matters alleged were matters of engineering judgment, not properly subject to spontaneous determination by a court or by a master in chancery on the basis merely of his own information and opinion as to the advantages of the circuitous route over the more direct route. When a land grant road is authorized to build between two named termini and the land described in the grant is to be ascertained in relation to the location of the line, the road must follow the most direct and practicable route. *United States* v. *Northern Pacific Rd. Co.*, 152 U. S. 284, 292; *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1, 13. The master apparently overlooked these considerations when, in passing on the demurrer to subdivision XXVI, he declined to assume, in accordance with the usual rule, that the allegations of this subdivision were true (R.

328). The fact that the Milwaukee railroad was constructed on a more direct line from Lind to Ellensburg was at least *prima facie* evidence of the truth of the allegation which the master found to be false.

The sole question on this point is whether the United States is entitled to show by evidence that the route followed was unnecessarily circuitous to the extent of 82 miles. If, as subdivision XXVI alleged, it was not the most direct and practicable line, the company has received from the United States, on account of the deviation, at least 1,400,000 acres of land to which it was not entitled. It is submitted that the United States plainly had the right to show these facts and, upon showing them, to have credit in the decree for the 1,400,000 excessive acres which the company thus obtained.

The stricken subdivision shows in detail that the deviation came about as the result of the company's failure to disclose its absence of real intent, or, abandonment of intent, to complete its main line to Portland and thence to Puget Sound as required. As a result of the company's concealments and misrepresentations the approval of the Secretary of the Interior was procured piecemeal to the location, as branch lines, of the several portions of the devious routes ultimately used to reach Tacoma (R. 52, 54). The Secretary's approval of these sections as branch lines did not constitute their approval as a part of a main line. *United States* v. *Oregon, &c. Railroad*, 164 U. S. 526, 544.

As under the allegations of subdivision XXVI they did not constitute the most direct and practicable route, if the Secretary had approved them as parts of the main line, such approval would have exceeded his authority (R. 53). *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Utah* v. *United States,* 284 U. S 534, 545–546.

If it should be decided, despite the contentions made in other sections of this brief, that the company was entitled, up to the effective date of the Act of June 25, 1929, to select indemnity lands, it is submitted that the 1,400,000 excess acres it has received as a result of constructing its line between Lind and Ellensburg by the indirect route described in subdivision XXVI should be deducted in measuring the total acreage which it was entitled to select. If a land-grant railroad elects to build by an unauthorized and circuitous route, it should not be permitted, by the deviation, to increase the land which it receives under its grant.

The court in its decree has credited the company with these additional 1,400,000 acres, and has determined that there were within the limits originally granted 42,802,867.05 acres (R. 642, Para. IV) an amount which, for the reasons just stated, exceeds the correct amount by 1,400,000 acres.

These 1,400,000 acres represent only the excess acreage acquired by the company as the result of the 82 extra miles in the circuitous route. The master indicated hypothetically (R. 327) that

if the route actually followed was not authorized the company would not be entitled to *any* lands opposite that route. *St. Paul & Pacific* v. *Northern Pacific,* 139 U. S. 1, 13; *United States* v. *Oregon &c. Railroad,* 164 U. S. 526, 544. If this is so, and the devious route was in fact unauthorized, the 1,400,000 acres are far less than the credit which the United States might claim. In that case, all of the land received by the company along the line actually followed between Lind and Ellensburg via Pasco would be a proper credit against the company's claim in this accounting suit. The United States has not claimed that total amount. There is no reason why the credit for the excess of 1,400,000 acres should be denied merely because the United States has not asked for all to which it might have been entitled. *Jones* v. *United States,* 258 U. S. 40, 47. To the extent of the 1,400,000 acres, the company is unjustly enriched and the United States should receive the amount of that unjust enrichment, *Stone* v. *White,* 301 U. S. 532, 534–535, by a credit in the accounting.

6. The United States is not barred from any of its defenses by statutes of limitations, *res judicata,* laches, estoppel, acquiescence, waiver, or otherwise

The company, as a virtual plaintiff, prays for compensation by the United States under the Act of June 25, 1929, c. 41, sec. 1, 46 Stat. 41, *supra,* p. 9 (App. 148). There is no other law under which it could seek compensation.

On grounds here briefly summarized, the United States denies that the company has any legal or equitable right to compensation. (1) The company's claim to a right to select indemnity lands rests, to the extent of over 1,000,000 acres, on the company's own fraud; (2) the Act which provided for the right to select became void by its own terms as a result of the company's failure to procure required stock subscriptions; (3) the company has no right to select the greater part of the lands for which compensation is sought on a mineral base, because they were not agricultural lands; (4) the company, in failing to complete the whole railroad, has been guilty of a substantial failure to perform an essential condition to its right to select indemnity lands; and (5) there was no deficiency because the company has already received, by various errors or mistakes, an amount of land greatly exceeding the amount it was entitled to receive under the grants. The United States is not barred from asserting any of these defenses by the statute of limitations, by *res judicata,* by laches, by estoppel, by acquiescence, or by waiver.

The scope of the determination required by the act of June 25, 1929

The original granting Act of July 2, 1864, provided that Congress may at any time, having due regard for the rights of the company, add to, alter, amend or repeal the Act, *supra,* p. 12. The Act

of June 25, 1929, purports by its title, to be such an amending act, *supra*, p. 9. It forfeits the rights claimed by the company and provides for a general adjustment. In terms it requires the courts to determine to what extent the requirements of the original Act have been carried out by the United States and by the company, and what lands the company has received as a result of fraud, mistake of law or fact, or through administrative misapprehension or otherwise, *supra*, p. 10.

It is upon this amending Act alone that the company bases its claim. It had no vested right to an estoppel or to rely on administrative waiver or acquiescence if any had occurred. Asserting its right solely under the Act, it must abide by the provision laid down by the Act for the determination of its rights. The Act as a whole requires a fair and unhampered determination of what has happened under the original Act since 1864, of the extent to which the rights granted by Congress have already been earned and perfected by the company, to what extent, if any, they have been withdrawn by Congress, and the compensation, if any, due the company for such rights as have been withdrawn. Proceeding under such an Act, the company is bound by principles which look to the abstract justice of the case. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 349–350; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 403; *cf. Pepper* v. *Litton*, No. 39, 1939 Term. The scope of the

direction given by Congress to the courts to inquire into these matters as a basis for the final award sweeps away any consideration of *res judicata,* estoppel, acquiescence and waiver by acts of executive officials.

The purpose of the power reserved to amend an Act such as the Act of 1864 and here exercised, is to enable Congress to protect the public interests and to preserve to the state control over its contracts. *United States* v. *Union Pacific Railway,* 160 U. S. 1, 49–50.

Even in the absence of this amending power Congress has authority, by curative statutes, to remedy mistakes and defects in administration where the remedy can be applied without injustice, even if the remedial act has the effect of destroying causes of action which otherwise would exist. *Graham and Foster* v. *Goodcell,* 282 U. S. 409, 429.

It is submitted that if the company (1) acquired its ostensible rights by fraud, (2) deceived Congress as to the continued existence of the original Act when it was void, or (3) failed substantially to carry out its obligations under the Act and to perform its conditions, Congress had absolute authority to forfeit any rights which it might claim. *Atlantic and Pacific Railroad* v. *Mingus,* 165 U. S. 413, 427–428; *New Orleans Pacific Railway Co.* v. *United States,* 124 U. S. 124, 129; *Farnsworth* v. *Minnesota & Pac. R. R. Co.,* 92 U. S. 49. An exercise of such authority by Congress is found in the

Act of March 3, 1863, c. 92, sec. 11, 12 Stat. 767, 28 U. S. C., sec. 279, passed only the year before the Act by which the grant in question here was made. That Act of 1863 provides that anyone who practices fraud in a claim against the United States forfeits the whole claim. Congress exercised the same authority by section 2 of the Act of June 25, 1929. *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 560; cf. *Farmers Loan & Trust Co.* v. *Galesburg,* 133 U. S. 156, 179. Such statutes are merely legislative applications of the rule announced by this Court in *Causey* v. *United States,* 240 U. S. 399. Provision was made for compensation only in case the courts should find that, for lack of any defense, the United States could not justly end the claims without compensating the company.

Manifestly Congress might predetermine in favor of the company such of these questions as it chose. It was under no obligation to forfeit all the rights which the company claimed, if instead it chose to recognize some and forfeit only a part.

It is submitted that by the Act of June 25, 1929 (App. 148), Congress intended to require a full and unhampered judicial inquiry as to the whole question whether, in fact, the company, in view of all that had occurred, was entitled to any compensation based on rights derived from these grants.

Obstruction of that inquiry into the substantial truth of the matter would defeat the purposes of the Act, whether that obstruction resulted from a

statute of limitations, or from *res judicata,* laches, estoppel, acquiescence, or waiver.

In *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, this Court, considering an act similar, with respect to the scope of inquiry, to the Act of June 25, 1929, said of it, p. 465: "Looking at the words of the act of 1892 and the peculiar nature of the important questions involved in any suit brought under it, we cannot suppose that Congress intended to relieve this court from the responsibility of determining for itself and upon its own view of all the evidence what were the ultimate facts bearing upon the inquiry as to the alleged fraud in bringing about the award in question."

Apart from the wide scope of the inquiry required by the Act of June 25, 1929, there is no basis in the record of this case for application of the doctrines of *res judicata,* laches, estoppel, acquiescence, or waiver to bar the defenses asserted by the United States to the company's claim.

Statutes of limitations

Although statutes of limitations were pleaded by the company, the record indicates that they were not pressed and they require no further consideration.

Res judicata

No judgment has been entered heretofore, as to any indemnity lands or rights of selection, contrary to anything which the United States submits in

defense in this case. No issue concerning the questions involved in this case has been decided or presented in any earlier judicial proceeding. It is only when the *res* is the same that the judgment is *res judicata;* and if the *res* is a different one, even if the decision is dependent on the same issue, the judgment is not an estoppel as to that issue unless it was actually tried in the earlier case. *Myers* v. *International Co.,* 263 U. S. 64, 70–71; *Southern Pacific R'd Co.* v. *United States,* 183 U. S. 519, 533. The company relied below upon *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51, 60, as having decided that the railroad was located and constructed as required (R. 174). To this contention there are at least two answers: (1) no judgment was entered in that case (R. 174, 511–512); (2) the opinion in that case does not hold that the company completed the whole main road to Puget Sound by way of the Columbia River Valley as the Act of July 2, 1864, and the Resolution of May 31, 1870, required. It says instead that the company completed the road from Lake Superior to Tacoma on Puget Sound and thence to Portland. That is a fact not here disputed. The agreed statement of facts on which the earlier case was considered stated merely that "the construction of the entire road was not completed prior to the year 1887." That statement is true but it refers, not to the road required by the Act and the Resolution, but to the road which in fact was built. The agreed statement of facts upon which the

earlier case was decided does not say that the road required by the Resolution has ever been completed and that question was neither considered nor decided.

Since none of the issues in question here had been tried or decided in any prior suit involving the same question, the defenses of the United States are not barred by the doctrine of *res judicata.*

Laches

The United States is defending here against the company's claims not as a party to a business transaction but as a sovereign guardian of the public interests. In such a situation the United States is never barred by laches. *Chesapeake & Del. Canal Co.* v. *United States,* 250 U. S. 123, 125; cf. *United States* v. *Minnesota,* 270 U. S. 181, 196.

Estoppel

None of the elements for estoppel against the United States is present in this case with respect to any of the defenses asserted. *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393, 425. The United States has concealed nothing from the company nor has the company changed its position to its disadvantage because of anything the United States has done or left undone. Such rights as the company obtained it acquired when the Act of July 2, 1864, as supplemented by the Resolution of May 31, 1870, became law. Such action as it took

thereafter towards construction of the railroad was taken without reliance upon any subsequent action or nonaction of the United States. There was no executive official authorized to create an estoppel against the United States which would bar it from making the defenses it now makes. Nor does it appear from the record in this case that either Congress or any executive official had knowledge of any facts which called upon them to take earlier advantage of the defenses now presented. Moreover, Congress does not act by estoppel but can affect the rights of the United States only by laws. As this Court stated in *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234: "It is true, as is argued at length by counsel for the defendants, that Congress had opportunity by the reports of its committees, and otherwise, to learn of this lease; but we are referred to no legislation passed by Congress authorizing or approving of it. In our view the lease for 99 years by the Central Pacific to a rival and competitive company could not legally be made without authorization by federal legislation. In the absence of such action the Central Pacific had not the corporate capacity to make the lease." No laws have been enacted which bar any of the defenses asserted by the United States.

Acquiescence and waiver

Congress has never empowered any executive official to acquiesce in the company's fraud or in

its failure to perform its obligation to complete the whole railroad and thereby to waive these defenses. *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123; *Utah* v. *United States,* 284 U. S. 534, 545–546; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409. Nor can action based on misconstruction of a statute or other mistakes by any executive officer bar the United States from its defenses. *Sanford's Estate* v. *Commissioner of Internal Revenue,* 308 U. S. 39; *Wisconsin Central R'd Co.* v. *Forsythe,* 159 U. S. 46, 61; *Haggar Co.* v. *Helvering,* No. 176, 1939 Term.

In order to make it plain that no acquiescence, waiver, or estoppel may be fashioned out of the facts in the record here to bar the defenses asserted by the United States, it may be helpful to consider severally the circumstances affecting each of those defenses upon which it might be claimed that such an inhibition might arise.

The fraud and corruption practiced by the company

Prior to the inquiries before the Joint Committee pursuant to the Resolution of 1924, there had been nothing to bring to the Secretary of the Interior a conviction that the company had been guilty of fraud and corruption.

The master (R. 335–344) in stating his reasons for concluding that subdivision XXVIII of the bill should be stricken because of estoppel (R. 349),

describes the disclosures made to the Secretary of the Interior.

He indicates that at some time after March 11, 1908, a committee of the Montana Mining Association filed with the Secretary of the Interior a report complaining of the manner in which the work of classification had been done and that on March 4, 1909, the legislature of Montana sent a memorial to Congress seeking reclassification (R. 343). These complaints had no bearing on the company's fraud alleged as a defense to the company's claim in this suit. The Montana miners were not concerned about the company's fraud in getting lands classified as mineral. On the contrary they wanted to make mining locations in the place limits on lands which they claimed to be mineral but which had been classified as non-mineral. The memorial of the Montana legislature asserted merely that the commissioners were incapable, that they had not examined the properties which they had certified that they had examined, and that the classifications were unscientific and erroneous. It was not suggested that the company was responsible for these errors or omissions (R. 695, N. P. Ex. 57, 697, 705, N. P. Ex. 59, 713, N. P. Ex. 60, 725–731, N. P. Ex. 80).

The only reliable information before the Secretary on which properly he might have acted was contained in the reports of a special agent sent out by the Interior Department to investigate. This agent made two reports (R. 695, N. P. Ex.

57, 699, N. P. Ex. 58). One of these, dated February 1, 1908, details many of the charges of fraud which had been made, some of which the agent says were probably true (R. 343). It does not appear, however, that the agent's reports implicated the company in the fraud (R. 699–705, N. P. Ex. 58). He criticised mainly the commissioners' lack of practical knowledge and the impossibility of arriving at a correct classification (R. 697, 699, 702). Promptly, upon receiving these reports, the Secretary made an order against further issuance of patents (R. 727).

Conferences followed between the Secretary and the company's land commissioner (R. 732, 737). There is no suggestion that at any of these conferences, the Secretary of the Interior or any other officer of the Government had any knowledge or conviction that the company had been guilty of fraud or corruption in obtaining the classification. No facts were laid before Congress or before the Secretary which would make it seem probable that the company had participated in any fraud and, as far as appears, the Secretary had no information that the company had induced the commissioners to classify poor lands as mineral and good lands as nonmineral, irrespective of their mineral character, or that the commissioners had received passes or any other type of bribes from the company, or had any relations with the company which impaired their disinterested exercise of judgment (R. 741–743). Nor is there anything in the records

of suits in which the commissioners were parties, which the company has put in evidence (R. 689–693, N. P. Exs. 50–54), to bring to the attention of the Secretary any contracts between the commissioners and the company at the time the classifications were made. The commissioners involved in those suits had already left the commission.

The Secretary and the company's land commissioner arranged for a reclassification of a relatively small acreage but that arrangement was not based on any fraud on the part of the company. Nor was there any suggestion of any fraud practiced by the company. This reclassification was made at the instance of the company claiming that 33,921.70 acres which had been classified as mineral was in fact nonmineral. Although the United States Geological Survey classified "only 2,836.69 of these acres as mineral lands" (R. 738, 740, N. P. Exs. 84, 85), the Secretary of the Interior never confirmed the mineral classification or any part of it and has not reclassified these acres to any substantial extent. Although the commissioners' assertion that they had made a personal examination when they had not, is in itself a fraud, *Lamb* v. *Northern Pacific R. R. Co.*, 29 L. D. 102, (1899), that kind of fraud differs widely from the fraud relied upon as a defense here, which involved the company's active procurement of a classification made without regard to the mineral character of the land.

The Secretary has never in law or in fact waived any fraud or corruption on the part of the company or acquiesced in any of the company's fraud or corruption.

The company's failure to procure the required stock subscriptions

As has been pointed out above, there is nothing to indicate that it became known to any government official prior to the investigations before the Congressional Committee in June 1924 and thereafter, that the required bona fide subscriptions to the company's stock, with 10% paid in, had not been made and that the company's representations to Congress that they had been made were false. Manifestly, in the absence of such knowledge, the United States cannot be barred from that defense by estoppel, acquiescence, or waiver. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 270; *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 427; *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234; *United States* v. *Pan-American Petroleum Co.*, 55 F. (2d) 753, 773 (C. C. A. 9), certiorari denied, 287 U. S. 612.

Agricultural lands

Nor can there be any question of estoppel, acquiescence, or waiver applicable to the defense that more than a million acres for which compensation was decreed were not "agricultural lands," as lands selected as indemnity in lieu of mineral

lands in the place limits were required to be. No executive officer of the United States has determined that any of those lands were agricultural lands within the meaning of the Act of July 2, 1864. The Secretary of the Interior had no authority to change the meaning of that word to cover all lands which were merely nonmineral lands. Moreover, it does not appear that he has ever rendered any decision based on a meaning different from that intended by the Act.

Failure to complete the whole railroad

There was nothing to indicate until long after 1887 that the company was not going to complete the whole railroad required by the granting acts and thereby would fail to fulfill the condition expressed in those acts. No executive officer of the United States has ever attempted to waive that condition. Moreover, Congress having imposed the condition, no one else had any authority to waive it. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409; *Utah* v. *United States*, 284 U. S. 534, 545–546.

The issuance of patents as sections of the road were completed could not be construed as a waiver.

Section 4 of the Act of 1864, *supra*, p. 11, provided for an examination by commissioners appointed by the President as each twenty-five consecutive miles was constructed ready for service. If the commissioners found that the section

conformed to the physical requirements of the Act they were so to report and thereupon patents were to issue. The issuance of patents under this requirement could not be refused. It was a purely ministerial act. The fact that the same act which required the patents to be issued in installments before the road was completed also required, as a condition of the grant, that the whole road be built, makes it plain that the issuance of patents in installments was not intended by Congress to be significant as a waiver of the requirement that the whole road be completed before any right to make indemnity selections should arise. There is no inconsistency between the two provisions as applied to the unselected indemnity lands on which the company's claim in this case is based. There is no effort in this case to get back the place lands patented in installments. In view of these facts the issuing of the patents as required by the Act obviously did not betoken any acknowledgment that the whole road had been completed or waive the failure to complete it.

Similarly there has been no acquiescence in the construction of the road to Tacoma by the unnecessarily circuitous route actually followed. The locations and the issuance of patents opposite this line were called for at the time that road was built, in connection with its construction as a branch line. The road was accepted as it was constructed, as a branch, and with the expectation that the main

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line would run along the required route. The acceptance of the road as a branch and the issuance of the patents on that basis cannot be distorted into an indication of an intention to accept this circuitous route as a substitute for the main line required by the Act. *United States* v. *Oregon &c. Railroad,* 164 U. S. 526, 544.

Nor does the action of the United States in utilizing the facilities of those portions of the road actually constructed constitute a waiver of the requirement that the company complete the entire road specified in the granting legislation. The United States was entitled to use the facilities on such parts of the road as were constructed as rapidly as they were built. Its exercise of those rights has no relevance to the question of acquiescence in the failure to complete the whole road required. *Grand Trunk Wn. Ry. Co.* v. *United States,* 252 U. S. 112; *Chicago, St. P. &c. Ry.* v. *United States,* 217 U. S. 180.

There is no act of Congress which operates as an estoppel, acquiescence, or waiver

By the forfeiture clause of the Act of June 25, 1929, c. 41, sec. 2, 46 Stat. 41 (App. 149), Congress elected to rely on all the defenses to the company's claim which might exist. No intention to acquiesce in the company's failure to perform any condition of the grant nor any intention to waive

any defenses is to be found in that provision, which is the first expression of Congress on this subject after the disclosure of the facts on which the defenses of the United States to these claims are based.

Section 8 (App. 154) predicted future action by Congress, if existing remedies in court were inadequate. It seems that this was an outgrowth of the experience with the Oregon and California Railroad grant. *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393, 436.

The company relies on various Acts of Congress from 1870 to 1931 (R. 156–163), which are set out in the Appendix (pp. 60–155). Not one of them shows any waiver or acquiescence by Congress. Not one of them constitutes an estoppel to the right of Congress to exercise its amending and forfeiting power as it has done in the Act of June 25, 1929. In several Congress expressly disclaims any waiver or acquiescence (App. 69, 70, 76, 95, 109).

The Act of March 3, 1887, c. 376, 24 Stat. 556, which provided for the adjustment of railroad grants by the Secretary of the Interior and under which thereafter he administered such grants, contained, in section 4 (App. 72), the direction that the Act should not be construed "as a waiver of any rights that the United States may have on account of any breach of said conditions." This was a clear expression by Congress that it did not waive any

condition and did not authorize the Secretary of the Interior then or thereafter to do so.

The public announcements, March 1, 1898, and thereafter of the intention of Congress to retain unselected indemnity lands in the forest reserves, was a clear election to terminate any rights of selection from such lands which the company might have. Nothing Congress did thereafter was a waiver affecting any such rights.

That Congress did not by the Act of June 25, 1929, recall titles which had vested, and thereby refrained from exercising all the forfeiture rights which the United States might have had against the company is no indication of an intention to waive the performance of the expressed conditions of the grant. *Jones* v. *United States,* 258 U. S. 40, 47. To have declared a forfeiture of the patented lands, much of which had gone into the hands of innocent purchasers, would have worked a hardship on people who were in no way responsible for the company's failure to perform those conditions. Defenses may remain available even if the intention to rely on them has not been declared before a suit is brought. *College Point Boat Co.* v. *United States,* 267 U. S. 12, 15–16.

7. The company is not entitled to compensation for all the lands described in the decree, having failed to show that it would or could have selected and obtained all of such lands

The company had acquired no title to any of the lands for which compensation has been awarded. *Humbird* v. *Avery,* 195 U. S. 480, 508; *Southern Pacific Railroad Co.* v. *Bell,* 183 U. S. 675, 687. They were all open to entry and acquisition by homesteaders and others entitled to acquire lands under the public-land laws. *Hewitt* v. *Schultz,* 180 U. S. 138; *Southern Pacific Railroad Co.* v. *Bell,* 183 U. S. 675. The court has so found. (Finding, R. 607, par. (f), 610 (j), 614 (f). Homestead entrymen, holders of various kinds of scrip, and States entitled to select indemnity in lieu of school lands lost, were all permitted to acquire preferred rights in them prior to survey. 43 U. S. C. secs. 166, 861, 863. If none of them had been withdrawn the company's selections would have had to await surveys, *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51, 61; and it would have been compelled to take its chances with others in any attempt to acquire them. Nevertheless, the court has awarded compensation for all the withdrawn lands for which the company may now assign losses, despite the fact that even if the lands had not been withdrawn the company would not, and could not have obtained all of them.

Therefore, the company's right of selection was not the equivalent of any particular quantity of lands. It was at best no more than a contingent power. *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570. It was subject to the inherent infirmity that it must be exercised in competition with many others. That such other persons would have taken many of the lands is obvious from the experience had with this grant from the very beginning. The area of available vacant lands was constantly being diminished by these other entries. It was the continuing influx of settlers which led to the creation of a second indemnity belt. The company repeatedly found it expedient to select in first indemnity limits, even for subsequent losses, to prevent a larger quantity from going to settlers (N. P. Ex. 138 revised, not printed).

Not only would much of the land have been acquired by persons other than the company, but in all likelihood such acquisitions would have embraced the most valuable tracts. The homesteader had a right to initiate a right before survey, and therefore before the company could make selection. Accordingly, he would tend to take the choice parcel.

The company is not entitled to compensation for more than it would have if the withdrawals had not been made. For the court to allow compensation for all these lands was to treat the indemnity selec-

tion rights as though they were the equivalent of a title to all the lands in the withdrawals. This was error.

Because such a selection right "contemplates the uncertain and looks to the future," *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570, it was error for the court to disregard the great uncertainty that any particular quantity of these lands would have been acquired, and the certainty that all would not. In *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, a similar contingency was held a bar to compensation for the taking of land subject to an easement.

The rule is the same whether the company's claim here is for breach of contract or for just compensation for property taken. In any event it "must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255; *Bauman* v. *Ross*, 167 U. S. 548, 574.

The effect of the court's decision is to treat the lands subject to the selection rights as if they had been withdrawn from the public domain for the exclusive benefit of the company. That is not the case. A withdrawal made for the express purpose of preserving all these lands for the company would have been void. *Hewitt* v. *Schultz*, 180 U. S. 139, 147–157. Yet the effect of the decree is to give the company compensation for all these lands, many of which, in the ordinary course of events, would have

been acquired by others. In this way the decree would accomplish a result which the Land Department could not have brought about by deliberate action.

Thus, as the record stands, there is no evidence as to what portion of these lands the company would have selected or obtained had the withdrawals not been made.

Not only is it certain that many of the lands, and probably the more valuable ones, would have been taken by homesteaders, but there is no proof as to which lands the company would have chosen to take, even if no competition for lands had existed. The record of selections actually made by the company shows that large areas were allowed to stand, after survey, without any apparent effort on the part of the company to secure selection (Gov't. Exs. 95 and 96, narrative statement p. 212, unprinted). From 1900 to 1905, for example, the company made no effort to have second indemnity limits laid down in Idaho, or to make indemity selections there, although, throughout that time, there was never less than 37,000 acres of surveyed land there. Despite the fact that the company had 29,857.23 acres of unused subsequent losses which it could have satisfied in that belt, it selected only 280.98 acres (Gov't Exs. 95 and 96, narrative statement p. 212, unprinted). The reason for such inaction was undoubtedly the

fact that in many cases the company did not care to pay taxes and other charges on lands which it might be required to hold for many years. The nearly six million acres still owned by the railroad in 1917, unsold, and apparently unsalable (R. 753), was a likely deterrent to such selections.

Difficulties of proof are not a reason for substituting a greater recovery than the loss actually shown to have been sustained. It is not necessary to determine at this time whether the company might be able to prove the extent of its loss or damage. Certainly this record does not establish the damage, nor indeed, does it show whether any damage occurred. These facts cannot be supplied by conjecture. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 165. The ignoring of these contingencies in the company's rights and the awarding of compensation in the absence of a showing that the rights claimed would have been made effective was error.

8. The court erred in holding that the lands outside th right of way which were within Indian reservation by virtue of the treaties of 1851 and 1855, were grante to the company notwithstanding those reservations

The court struck subdivision XXIX from th bill (R. 412).

In this subdivision the United States alleged th making of the treaties of September 17, 1851, an October 17, 1855, whereby the United States re served certain lands for Indian tribes therei named; and the making of the treaty of May 7 1868, between the United States and the Crow tribe of Indians, by which the Crow reservation established under the treaty of September 17, 1851 was reduced and the lands excluded by the reduc tion were restored to the public domain. It alleged that the primary and indemnity belts under the Act of July 2, 1864, 13 Stat. 365, crossed some of the lands reserved by these treaties of 1851 and 1855 and that through mistake, and without authority, the company had received from the United States out of these reservations approximately 12,000,000 acres in the primary and first indemnity limits and 1,300,000 acres in the second indemnity limits, to none of which it was entitled; and had received, for these 13,300,000 acres, patents which were void, as the company should have known (R. 66–70).

There was no question about the underlying facts. The patenting of these lands to the company was purely a mistake of law. Instead of being granted to the company by the Act of July

2, 1864, as supplemented by the Resolution of May 31, 1870, these lands were excepted from the grant. As a result of this mistake the company obtained approximately 10,925,000 acres (Ex. Z of bill of complaint unprinted, pp. 699–815) as place lands within the area reserved in the treaties and, as a result of the error, has received upwards of 2,800,000 acres more than it could possibly have obtained by indemnity selection (Ex. Z of bill of complaint and Gov't Ex. 103, neither printed, R. 201). Having received this unauthorized excess, the company should not be awarded compensation in this proceeding on account of any unsatisfied selection rights it now claims to have. They have been satisfied in this other way. This appeal does not require a decision as to the precise result that would follow a correction of these errors but only whether in this accounting suit the United States properly has pleaded this oversatisfaction of the company's rights under the grant, and, if so, whether the United States is estopped to assert it.

The court's reason for striking out subdivision XXIX (R. 349–364, 410–412) was that the lands reserved to these Indian tribes by the treaties of 1851 and 1855 were within the grant to the company. It is submitted that that conclusion is erroneous.

The Indian treaties described

The text of the treaty of 1851, except for descriptions of land, is printed in the appendix to

this brief, pp. 5–8. It was in the form of a two-party covenant between the United States and the tribes. The tribes agreed to recognize the right of the United States to establish roads, military and other posts, within "their respective territories," and to make satisfaction for future wrongs committed by the people of their tribes on the people of the United States lawfully residing or passing through "their respective territories." The Indian nations recognized and acknowledged the designated tracts of country as "their respective territories," * * * and further specified "that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." In consideration, the United States agreed to pay $50,000 a year for ten years to be distributed among these Indian nations in proportion to population. The President was authorized to extend the payments for five additional years. This was done. Such payments were being made at the time the Northern Pacific grant was made.

The text of the Blackfoot Treaty of 1855 is also printed in the appendix (pp. 9–22). It also was in the form of a two-party covenant between the United States and the tribes. The Blackfoot nation consented and agreed that the territory recognized and defined as their territory by the treaty of 1851, described above, should become a common hunting ground (article 3). The parties "agreed and consented" that an area therein described

"shall be the territory of the Blackfoot nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty" (article 4), and "consent and agree, that the United States may * * * construct roads * * * build houses for agencies, missions, schools, farms, shops, mills, stations * * *," (article 8). In consideration for the "foregoing agreements, stipulations, and cessions * * *," the United States agreed to expend $20,000 per year for ten years for useful goods and provisions (article 9), and $15,000 per year for ten years "in establishing and instructing them in agricultural and mechanical pursuits * * *" (article 10). Payments were being made under these provisions at the time the Northern Pacific grant was made.

That the Congress which made the grant of July 2, 1864, understood that this treaty created a reservation for the Blackfoot Indians is shown by the fact that the very same Congress passed its Act of March 3, 1865, c. CXXVII, 13 Stat. 541, 559 (App. 52), making an appropriation to enable the Secretary of the Interior to negotiate a treaty with the Blackfoot and other tribes of Indians for the relinquishment of "so much of their reservation as lies south of the Missouri River." This was not a move to extinguish Indian title for the benefit of the company for it was not known at that time what general course even, the railroad would take. This was more than five years before any map of general route was filed and more than fifteen years

before a map of definite location through the reservation was filed (R. 50, N. P. Ex. 131, App. 2).

Construction of treaties with Indian tribes should incline toward the Indians

In construing treaties with Indian tribes, in case of doubt, this Court inclines toward a non-technical construction in favor of the Indians. *United States* v. *Reily*, 290 U. S. 33, 39; *Marlin* v. *Lewallen*, 276 U. S. 58, 64; Cf. *Board of Commissioners* v. *United States*, No. 14, 1939 Term.

The treaties of 1851 and 1855 were solemnly made. The construction put on them by the master and approved by the court is open to the criticism expressed by the Supreme Court in *United States* v. *Winans*, 198 U. S. 371, in which, at p. 380, the court said: "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

Naturally, the Indians would understand that these covenants referred to "their" "territories." The United States was granting or confirming territories to them as theirs. The acknowledgment by the Indians of the right of the United States to establish roads, military and other posts, plainly

indicates no recognition that those territories remained "public lands" of the United States to which the United States had "full title" or any understanding that that land was neither "reserved" to the covenanting Indians, nor in any way "appropriated" to them, or that they had no "claims or rights" upon such land. Plainly the Indians were treating the territory as theirs.

The undertaking of the United States in the treaties to aid the establishment of the Indians in agricultural pursuits emphasizes the quality of permanency in the Indian rights.

It is submitted that an honest nation could not, without breach of its covenant, take that land without obtaining the leave of the Indians and grant it to a railroad corporation for exclusive private ownership, which would carry with it necessarily the right of the grantee to exclude every Indian from any use whatever of any part of "their" "territories," so that the Indians might not even set foot on it.

*The lands covered by these treaties were not on July 2, 1864 "public lands" to which the United States had "full title, not reserved, * * *, granted, or otherwise appropriated, and free from * * * other claims or rights."*

Unless the lands subject to these Indian treaties had these qualities they were not granted to the company, *supra*, p. 11.

In *United States* v. *O'Donnell*, 303 U. S. 501, 510, this Court repeats again the definition of "public lands" as those words are used in land grants, namely, "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 119; *Scott* v. *Carew*, 196 U. S. 100. This has been held to be the case even though the appropriation be afterwards set aside. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741, 745; *Newhall* v. *Sanger*, 92 U. S. 761. The general words of the granting act are to be read as subject to such exception. *Scott* v. *Carew, supra*, 111, 112; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *United States* v. *Minnesota*, 270 U. S. 181, 206."

Repeatedly this Court has held that Indians acquired rights in the lands covered by treaties, and that this precluded disposal of these lands to others without the consent of the Indians. *United States* v. *Shoshone Tribe*, 304 U. S. 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Klamath Indians*, 304 U. S. 119, 123; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–376; *United States* v. *Creek Nation*, 295 U. S. 103, 110; *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283; 230 Fed. 591 (C. C. A. 9, 1916); *Minnesota* v.

Hitchcock, 185 U. S. 373, 389–395; *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413; *Spalding* v. *Chandler*, 160 U. S. 394, 404; *Missouri, Kansas and Texas R'y Co.* v. *Roberts*, 152 U. S. 114; *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 542; *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629; *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733, 741–742.

There have been several pertinent decisions to the same effect in the courts below. *Fort Berthold' Indians* v. *United States*, 71 C. Cls. 308, 331 (1930); *Blackfeet, et al. Nations* v. *United States*, 81 C. Cls. 101, 136 (1935); *Northern Pacific R. Co.* v. *Maclay*, 61 Fed. 554 (C. C. A. 9, 1894); *Northern Pacific R. Co.* v. *Hinchman*, 53 Fed. 523, 527 (C. C. Mont. 1892); *Caldwell* v. *Robinson*, 59 Fed. 653 (C. C. Idaho, 1894); *Robinson* v. *Caldwell*, 67 Fed. 391 (C. C. A. 9, 1895).

In the *Fort Berthold* case, just cited, the Indians were awarded over $4,900,000 from the United States, less offsets, for taking a part of their reservation created by the treaty of 1851, described above.

In the *Blackfeet* case, just cited, the Indians were awarded over $6,000,000 from the United States, less offsets, for taking a part of their reservation created by the treaty of 1855, described above.

These two decisions are even more significant when contrasted with recent decisions by the same

court, holding that Indians occupying under claim of original right, without treaty, cannot recover. *Duwamish et al. Indians v. United States,* 79 C. Cls. 530, 597, certiorari denied 295 U. S. 755; *Coos Bay Indians v. United States,* 87 C. Cls. 143, certiorari denied 306 U. S. 653.

This difference distinguishes *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55. The master so ruled (R. 363). The Indians there had no treaty. The area was "Indian country," subject only to such rights as might be accorded as a matter of grace, to the aborigines.

The difference is that the United States, by the covenants of a treaty, pledges its faith to the Indians, *Leavenworth, etc., R. R. Co.* v. *United States,* 92 U. S. 733, 742, and must not break it by giving the same land to another—here, the Northern Pacific Railroad Company. This opinion is quoted with approval in *Northern Pac. Railroad* v. *Musser-Sauntry Co.,* 168 U. S. 604, 609, in which it was held that the exceptions in the grant to the Northern Pacific Railroad Company were to be construed broadly.

Mere size of a treaty reservation does not affect the rights granted by the treaty

The court in this case reached the conclusion that by the treaties of 1851 and 1855 the Indian tribes acquired no rights or claims to the lands covered by the treaties and that such lands were not a reservation because the great extent of the

area covered would make it ridiculous to hold that the territory had been reserved to the tribes (R. 410–411).

It is submitted that the distinction is not between small reservations and large reservations, but rather between situations or agreements in which no rights are acquired by the Indians from the United States and agreements wherein the United States covenants to give or to preserve rights to the Indians. In *United States* v. *Shoshone Tribe,* 304 U. S. 11; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 485, this court dealt with a treaty which, by its terms, gave the Indians no more of right in the lands in question than did the treaties of 1851 and 1855 under consideration here. Treaty of July 3, 1868, 15 Stat. 673, 674. That treaty with the Shoshones provided, with respect to the lands there involved, merely that "the same is set apart for the absolute and undisturbed use and occupancy of the Shoshonee Indians herein named, and for such other friendy tribes or individual Indians as from time to time may be willing, with the consent of the United States, to admit amongst them" and the United States agreed that no persons, with stated exceptions, should be permitted to pass over, settle upon, or reside in the territory described. The treaty contained no words stronger than the words "their territories" used in the treaties of 1851 and 1855. The Crow territory in the treaty of 1851, to which the court in this case referred, contained 37,500,000 acres (R. 410). In the *Shoshone* case,

299 U. S. at 485, the court described 44,672,000 acres covered by an earlier treaty, 18 Stat. 685, as a reservation. Later the Court said (p. 496): "Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents * * *. The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land *pro tanto,* in substance, if not in form." This principle is applicable even if the strangers be the Northern Pacific Railroad Company.

It seems improbable that the master or the district court in the case at bar would have denied the rights of the treaty Indians under the treaties of 1851 and 1855, if the decision of this Court in the Shoshone cases had been rendered before their rulings were made. The report of the master on this point was filed May 31, 1933 (R. 262), and the memorandum opinion of the district judge September 9, 1935 (R. 408). The order striking out subdivision XXIX was entered October 3, 1935 (R. 411), and amended January 29, 1936 (R. 418), a year before the decision in the first Shoshone case (299 U. S. 476), and over two years before the second decision (304 U. S. 111).

Congress in donating vast amounts of lands is not to be presumed to intend to exercise its liberality at the expense of preexisting rights however imperfect, meriting legislative protection. *Broder* v. *Water Co.,* 101 U. S. 274, 276.

The obligation to extinguish Indian title created by section 2, which granted the right of way, did not apply to lands which were excepted from the grant by section 3

Section 2 of the Act of July 2, 1864, 13 Stat. 365, *supra*, p. 11, granted the right of way. It probably was to be through some Indian country. The right of way was essential. Since no one but the United States could deal with the Indians, it undertook in section 2 to extinguish the Indian title but its obligation was limited expressly to public lands "falling under the operation of this act". It did not apply to any land excepted from the grant by section 3. As a result of this exception, such land did not fall "under the operation of this act." Accordingly the obligation to extinguish the Indian title did not apply, outside the right-of-way, to land covered by the treaties of 1851 and 1855 because such lands were included within this exception from the grant.

9. The court erred in holding that the lands in the Crow reservation, as defined by the treaty of May 7, 1868, were losses occurring subsequent to July 2, 1864, notwithstanding the fact that those lands were within the reservation established by the treaty of 1851

The Act of 1864 authorized the indemnification of losses only in the first and mineral indemnity belts. By the Resolution of May 31, 1870, the indemnity areas were increased through the addition of a second indemnity belt, available under circumstances specified in the resolution as follows: "in the event of there not being in any State or Territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, *to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.*" [Not italicized in original.]

This provision expressly limited the extent of resort to the second indemnity belt in any state, to the amount of the lands in such state granted or disposed of subsequent to July 2, 1864. Congress placed this limit on the use of the second indemnity belt and no authority to exceed that limit exists.

In administering the Act of 1864, the Land Office (R. 786) computed the total of the subsequent losses in Montana as 2,636,204.53 acres, made up of 2,434,082.80 acres within the area of the reservation described in the Crow treaty of 1868 and 202,121.73 acres elsewhere. Before this suit was begun, the company had been permitted to select and had obtained patents for approximately 1,400,934.83 acres of lands in the second indemnity belt in Montana in satisfaction of an equal area of losses treated by the Land Office as subsequent losses (Govt. Ex. 89, not printed, R. 597). If the Crow losses are not subsequent losses, the company has already received in the second indemnity limits approximately 1,198,813.10 acres more than it had any right to select in that area. Although it has already received patents for approximately 1,400,934.83 acres in the second indemnity limits in Montana, the company asks in the pending suit for compensation under the Act of 1929 for 170,326.73 additional acres of lands withdrawn for forest and other purposes in that second indemnity belt (R. 778, N. P. Ex. F), and the court below awarded that compensation (R. 613, 644).

The United States submits that the so-called Crow losses are not subsequent losses and therefore that the maximum area of lands that could be rightly obtained in the second indemnity belt in Montana did not exceed 202,121.73 acres; and (1) that approximately 1,198,000 acres of the 1,400,000 acres of lands in the second indemnity belt in Montana, heretofore patented, were erroneously patented and should be charged to the company in this accounting, and (2) that, because the company has already received more lands in the belt than it was rightly entitled to receive, its claim for compensation on account of the 170,326.73 acres should be denied.

For many years prior to 1851 the Crow Indians had been in actual possession and claimed a right to the unceded lands subsequently defined by the treaty of 1868. They possessed it as a part of a much larger area. Their possession and claim to the larger area was recognized and confirmed to them by the United States and by adjoining Indian nations in the treaty of September 17, 1851, described in section 8 (*supra,* pp. 145–146).

Unquestionably the lands described in the treaty of 1851 were encumbered with an Indian title after that treaty was made. If they were excepted from the grant of 1864, as is submitted in section 8 of this brief, it necessarily follows that the losses to the grant including those in the smaller part of the area embraced within the later treaty of 1868, were not

subsequent losses and the erroneous administration of the grant on the assumption that they were subsequent losses should be corrected in this proceeding.

But even if the treaty of 1851 had not finally established a perfected title, the lands described in that treaty were encumbered certainly, with an Indian title which the United States had a right to recognize and to confirm. The rights created by the treaty of 1851 existed on July 2, 1864, the date of the grant. The United States could choose to confirm those rights unhindered by the 1864 grant. The grant to the company was *in praesenti* July 2, 1864, but its scope was not defined before the filing of the final location. If, before that time, the United States adopted and ratified the existing Indian title, that preexisting title became effective as one in existence before 1864.

By the treaty of 1868 the Crow Indians ceded all of the territory described in the 1851 treaty as "their territory," except that part described in the treaty of 1868. That part they did not acquire anew but continued to keep as they got it under the treaty of 1851. The treaty did not contain words of new grant. By its terms, Art. II, 15 Stat. 649, 650, the United States agreed that a portion of the existing described area "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named." The Indians agree that "henceforth they will, and do

hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid."

When it "set apart for the absolute and undisturbed use and occupation of the Indians herein named" it did not give them any use and occupation which they did not have in "their territory" under the treaty of 1851. Instead, before any definite map of location through these lands had been filed, the United States recognized the former title of the Indians and disclosed an intention to have none of the lands remaining in that title pass under the grant of 1864.

The title which was being confirmed was in existence when the grant was made to the Northern Pacific Railroad Company. The treaty was merely a step in carrying out the established policy of the United States of reducing the size of Indian reservations, by cessions from the Indians upon consideration, to the end that the Indians might continue to live in the localities claimed by them and that the ceded lands might ultimately be acquired under the public land laws.

This situation differs from the situation that would exist if a reservation were created afresh in the primary limits after the date of the grant and prior to the date of definite location when the Indian tribes had had no right before.

Here, when the grant of 1864 was made, the Crow Indians were in actual and notorious possession of the entire area described in the 1851 treaty, claiming rights thereto under the treaty. It follows from the circumstances that the reduced area confirmed by the treaty of 1868 had been disposed of before the grant of 1864 and was excepted from that grant. It was not a loss "subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The foregoing conclusion is fully supported both by reason and by authority. When the grant was made the company knew that the area was actually occupied by the Crow Indians and knew of the basis of their claim of title. Appropriations were being made to carry out the Government's obligations under the treaty of 1851 and the obligations were being carried out. The governmental policy of discouraging nomadic habits among the Indians and encouraging their establishment in agricultural and pastoral pursuits had long since been declared. It was to be expected that the Crow Indians would continue to occupy an area in the locality of their native habitats, especially since the United States and neighboring Indian nations had, by solemn treaty, recognized the territory as theirs. "The Indians had to be considered and it could not be assumed that they would be removed to another place." *Missouri, Kans. & Tex. Ry.* v. *United States*, 235 U. S. 37, 39. The grant to the company

was made and should have been accepted subject to the expectation that there were lands within the primary limits which, because of the rights of the Indians, would fall within the exception from the grant.

The treaty of 1868 confirmed in the Crow Indians a title which was in existence on the date of the grant in 1864 to the company. It was a possessory title and its character was not changed by the treaty. This Court said in *Spalding* v. *Chandler*, 160 U. S. 394, 403: "When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." In *Minnesota* v. *Hitchcock*, 185 U. S. 373, this Court, speaking of the Red Lake Indian Reservation, said (p. 389): "The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract."

The occupancy by the Crow Indians, on the date of the grant of 1864 to the company of the part of their territory which they did not cede in 1868 was not only actual and notorious, but was within the policy, and with the express consent, of the United States.

The principle applied in *Cramer* v. *United States*, 261 U. S. 219, covers the case at bar. In that case certain Indians were in actual occupation

of lands within the primary limits of the Central Pacific grant in California. The lands were occupied on July 25, 1866, the date of the grant, and continued to be so occupied on August 7, 1871, when the road was definitely located opposite them. The Indians rested their claim, not on any act of Congress or treaty with the United States, nor on any other governmental action, but on the general policy of the United States of encouraging Indians to discontinue their nomadic habits. On March 3, 1875, more than three years after the road was definitely located and the company's rights to the lands in the primary limits had been fixed, Congress passed an act under which title to public land could be obtained by Indians. Holding that lands in the occupation of Indians were excepted from the grant under the provision excepting lands "reserved * * * or otherwise disposed of" this Court said (p. 229–230): "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder v. Water Co.*, 101 U. S. 274, 276, furnishes an analogy. There this Court, holding that the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, acknowledging and confirming rights-of-way for the construction of ditches and canals, was in effect declaratory of a preexisting right, said: 'It is the established doctrine of this court that rights of

* * * persons who had constructed canals and ditches * * * are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary **recognition of a preexisting right of possession,** constituting a valid claim to its continued use, than the establishment of a new one.' Then, referring to the land grant to the Pacific Railroad companies, which was made expressly subject to 'preemption, homestead, swamp land, or other lawful claim,' and which antedated the Act of 1866, the Court held that defendant's right-of-way for its canal, independent of that act, was within the excepting provision of the grant and said: 'We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of preexisting rights, which, though imperfect, were still meritorious, and had just claims to legislative protection.' * * * In our opinion the possession of the property in question by these Indians was within the policy and with the implied consent of the Government. That possession was definite and substantial in character and open to observation when the railroad grant

was made, and, we have no doubt, falls within the clause of the grant excepting from its operation lands 'reserved * * * or otherwise disposed of.'" [Type not heavy in original.]

The same principle was applied in *Central Pac. Ry.* v. *Alameda County,* 284 U. S. 463, 473. First, without any action of the Government a highway was established over the public lands of the United States. Next, the United States made a grant to the Central Pacific Railroad. Next, was the act of Congress which provided "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This Court said: "Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary **recognition and confirmation of preexisting rights,** brought into being with the acquiescence and encouragement of the general government." [Type not heavy in original.]

If, in the *Cramer* case an act of Congress passed even after date of definite location of the road would act as a confirmation of rights in existence on the date of the prior grant so as to except lands

from the grant as of that prior date, surely the confirmation by the treaty of 1868 of the rights of the Crow Indians in existence on the date of the Northern Pacific grant would except such lands from that grant as of its date.

It is submitted that the loss to the grant of the unceded area described in the treaty of 1868 was not a loss subsequent to July 2, 1864, and, therefore that the lands received by the company in that area should be charged to the company in this accounting and that no compensation should have been awarded the company for such losses.

10. The act of June 25, 1929, did not authorize the making of a credit to the railway company in the accounting for the lands in the Northern Cheyenne Indian Reservation.

The decree includes within the lands for which the company is awarded compensation a total of 32,483.92 acres within the Northern Cheyenne Indian Reservation in Montana, 17,962.32 acres in the first indemnity limits and 14,521.60 acres in the second indemnity limits (R. 628, 468–470, 524, 643–644, 608, Govt. Ex. 146, 778, N. P. Ex. F). It is submitted that the allowing of this credit is error because these lands did not come within the description of lands for which compensation might be awarded under the Act of June 25, 1929, c. 41, sec. 1, 46 Stat. 41, *supra*, p. 9.

The only lands, if any, which qualify for compensation under this section are those "which, on June 5, 1924, were embraced within the exterior

aries of any national forest or other Govern-
reservation and which, in the event of a
ncy in the said land grants to the Northern
Railroad Company upon the dates of the
awals of the said indemnity lands for gov-
ntal purposes, would be, or were, available to
Northern Pacific Railroad Company or its
or, the Northern Pacific Railway Company,
emnity selection or otherwise in satisfaction
deficiency."

her Government reservation" is used in as-
on with national forests. The only with-
s covered are those "for governmental
es."

background of this Act was the decision in
States v. Northern Pac. Ry. Co., 256 U. S.
hat decision related to withdrawals for forest
es. It indicated that the United States
not withdraw for its own purposes so as to
a deficiency but it gave no indication that
ted public lands might not be devoted by the
States to other purposes such as Indian
tions or allotments, especially those for In-
who were occupying the general area when
d was definitely located.

he record of the extensive hearings before the
Committee leading up to this Act, no refer-
as been found to the Northern Cheyenne
Reservation or to these lands within it.

history of these lands and of the Northern
ne Indian Reservation make it evident that

Congress did not intend to include this reservation when it used the words "national forest or other Government reservation" withdrawn "for governmental purposes." At the critical time they were not "available" for indemnity selection.

On September 17, 1851, these lands became the territory of the Crow Indians and so were excepted from the grant of July 2, 1864, to the company. This is for the reasons stated under point 8 above. The United States obtained them for a substantial consideration on May 7, 1868, by the cession of the Crow Indians, 15 Stat. 649, and when the railroad was located in this area in 1881 the military authorities had already located the Northern Cheyenne Indians in this general area. The company was in a position to know of this location and that "the Indians had to be considered and it could not be assumed that they would be removed to another place as they had been removed before." *Missouri, Kans. & Tex. Ry.* v. *United States*, 225 U. S. 37, 39.

The imperfect rights which this tribe then obtained were freely recognized thereafter and finally definitely confirmed. Sen. Exec. Doc. 58, 52nd Cong., 1st sess. (1892) p. 179; Executive Order of November 26, 1884, Executive Orders Relating to Indian Reservations, 1912, p. 101; withdrawal of September 3, 1886, referred to on map opposite page 22 of Sen. Exec. Doc. 58 above referred to; H. Doc. No. 153, 55th Cong., 3d sess. (1899); Executive Order of March 19, 1900, Executive Orders Relating to Indian Reservations, 1912, p. 101.

The Executive Order of March 19, 1900, added the area now in question to the reservation designated as the reservation of 1884. For this reason it is submitted that on June 5, 1924, this area was within an Indian reservation and not within a "Government reservation" * * * "for governmental purposes" and that on that date it was not "available" for indemnity selection. The distinction in character of the Government's ownership was noted in *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 119. The court said that military reservations are the absolute property of the government but in the Indian reservations other rights are vested.

On June 3, 1926, Congress recognized these early rights, declared that the lands within the reservation were the property of the Indians, and authorized allotments, c. 459, 44 Stat. 690, App. 143. There were then 1,408 Indians in the reservation as enlarged and it contained 489,500 acres. None of the lands had then been allotted because it was thought best to keep them in tribal ownership for general grazing purposes. (Letter of Secretary of Interior, dated February 17, 1926, attached to Sen. Rep. No. 638, 69th Cong., 1st sess, p. 3). Pursuant to this Act, 1,547 allotments of 233,120 acres were made in 1932 (Annual Report of the Commissioner of Indian Affairs, 1932, p. 28). The remainder of the land continued to be held in common by the Indians.

Applying the words of this Court in *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116, "For all practical purposes, the tribe owned the land. * * * The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee."

Congress showed no intention on June 25, 1929, to deal with this Indian reservation. As has been pointed out in an opinion by Attorney General Stone, 34 Op. A. G. 171, 172: "Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto." *Bardon* v. *Northern Pacific Railroad,* 145 U. S. 535, 538; *Union Pacific R. R. Co.* v. *Harris,* 215 U. S. 386.

Congress having, on June 3, 1926, declared this area to be the property of the Indians could not have thought of it on June 25, 1929, as a "Government reservation" * * * "for governmental purposes" * * * "available" for indemnity selection.

In view of this history since 1851 it is submitted that Congress did not intend on June 25, 1929, under any circumstances, to provide for the award of any compensation to the company for lands in the Northern Cheyenne Indian Reservation. They were not within a "Government reservation." They were not "for governmental purposes." They were not "available" for indemnity selection. They were not "retained by the United States."

11. The court erred in disregarding the unsurveyed public lands remaining in the indemnity limits in determining the amount of land available for selection by the company

To entitle the company to compensation for lands retained by the United States in the forest reserves it was necessary, under the decision in *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, that the company establish that the exclusion of the lands in the forest reserves from selection created deficiencies in the indemnity limits.

Such a showing was impossible, not only because, as has been pointed out under point 4, *supra*, pp. 111–115, there was never any definite location of the whole railroad to fix the description in the grant, but also because the quantity of lands in the indemnity limits, available to satisfy selections as soon as it should be surveyed, could not be determined. The court, in holding that a deficiency existed and in purporting to fix the amount thereof, disregarded the existence of these unsurveyed lands (R. 612). It is submitted that this was error.

All that was required by the decision, 256 U. S. 51, was that the United States should not have disenabled itself to respond to the lawful selections which the company might make from the indemnity belts. Unsurveyed lands within the indemnity limits were patentable on compliance with the terms and conditions of the grant contained in the Act of July 2, 1864, and in the Resolution of May 31, 1870. Surveying was a step in the procedure.

It did not affect the character of the land. If the United States had the lands and the selection was delayed only by the absence of surveys, the remedy was merely to take the appropriate steps to secure the surveys rather than to invalidate the withdrawals or to hold that they created a deficiency when in fact they left an adequate amount of land within the described limits from which the selection could be made.

Much of the available land was of such a character that it was not worth the expense of surveying and the expense of the carrying charges. If it had been surveyed it would not have been selected. Notwithstanding this, the lands were available and they conformed to the descriptions contained in the contract.

The considerations which would lead to selections by the company, namely, considerations of salable value, differed widely from those which would determine the choice of the United States for forest reserves.

In the 2,000-mile route of the railroad there were millions of acres of forests which wise policy dictated should be preserved by the Government, notwithstanding that much of it might be of little or no value for sale. The indications were that there would be within the indemnity limits millions of acres in excess of those required to meet the lands lost to the company from the primary limits. In the outcome, the deficiencies have been due largely

to the unexpected classification of 3,700,000 acres of land as mineral, as a result of the fraud and corruption practiced by the company.

It cannot have been the intention of Congress, as expressed in the granting act, that the legality of every reserve for public use which the Congress might make or authorize from the indemnity belts must await the survey of enough land, previously unsurveyed, to keep always ready, sufficient surveyed lands to enable the company to make its selections whenever it got ready to make them.

There is nothing to indicate that Congress intended that the progress of the policy of establishing reserves in the public interest must wait until such time as the company might take the initiative in procuring the survey of great areas of worthless land or that the United States should pay compensation based on deficiencies computed without taking into account the vast acreage of unsurveyed land actually present in the indemnity belts.

Ignoring for the moment the huge areas granted to the other land-grant railroads, the area contained in the grant to the Northern Pacific Railroad Company alone was over 40,000,000 acres. It cannot have been intended that the vast undertaking of surveying this great quantity of land must be completed before the United States could make a valid forest reserve from any of the lands within the indemnity limits.

The Act of July 2, 1864, sec. 6, 13 Stat. 365 (App. 43), provided for surveys forty miles in width on each side of the railroad "as fast as may be required by the construction of said railroad." But the withdrawals for which the company has been allowed recovery were not from these lands but from indemnity belts outside these forty miles.

The Act of July 15, 1870, c. CCXCII, 16 Stat. 291, 305–306 (App. 60), enacted before the definite locations had been made, imposed upon the company the burden of paying for the survey and provided that no lands should be surveyed until the company had paid the cost of surveying. In 1873 a large area was patented to the company, but the survey fees amounting to $26,020.53 were not paid as required by the statute. In 1874 the Land Office notified the company that no more patents would be issued until all back fees were paid. The fees were paid under protest in 1882 (Narrative Statement, pp. 277–279, unprinted). In *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600, the validity of the fees was sustained.

The Act of July 10, 1886, c. 764, 24 Stat. 143, removed from surveyed lands in the place limits the immunity from taxation which previously they had enjoyed. It was never removed as to unsurveyed lands. This helps to explain the company's delay in putting up fees and in calling for surveys. It is immaterial whether this delay was justified or not.

It stood in the way of making surveys. Congress cannot have intended that the making of reservations for public purposes should be required to wait until the company chose to pay for surveys.

There is nothing in the decision in the *Forest Reserve* case, 256 U. S. 51, 61, to support the company's contention that only surveyed lands are to be counted in determining a deficiency. In that case it was stipulated that at the time of the withdrawal there were not enough lands remaining which the company was entitled to select under the regulations of the Land Department, to satisfy the selection rights. The contest in that case was between the contention of the United States that it could withdraw lands irrespective of whether it left enough lands to satisfy the remaining selection rights, and the contention of the company to the contrary on that broad question. After deciding that case against the contention of the United States the court (p. 67), remanded it for determination of the amount of the lands available as indemnity. The question whether unsurveyed lands were to be counted was not covered by the decision.

The district court in this case has applied the word "available" as if it meant "at hand, ready to be taken without going through the preliminary of a survey." It is submitted that "available" has reference to all land which fits the description in the granting act and resolution. They say nothing about whether the lands are surveyed or unsur-

veyed. If, for example, the selection is on a mineral base there must be remaining adequate agricultural lands, surveyed or unsurveyed. In the *Forest Reserve* case this Court, in defining the occasion on which there may be a lawful withdrawal, reservation, or appropriation, says merely (p. 65) that it is "where what remains is sufficient to satisfy all the losses." The Court then referred to *St. Paul & Pacific* v. *Northern Pacific,* 139 U. S. 1, 19. On this point that case held only that it appeared that there were actual deficiencies and even in the absence of selection, the indemnity lands did not pass to another railroad under a subsequent land grant. It is to be noted that that decision states that the rights became fixed before the President had caused the lands to be surveyed (p. 18). This amounts to saying that the lands were "available" for selection before survey. This, of course, has nothing to do with the methodical course to be pursued in making the selection which required identifications by a survey.

There is a striking fact in the *Forest Reserve* decision for its bearing on the meaning of availability (p. 61). The temporary withdrawal order for the forest reserve was made January 29, 1904, before the lands were surveyed. The survey was made thereafter, followed by a selection which, in turn, was followed by the final proclamation adding the lands to the forest reserve. If lands are not "available," in the sense in which the court below

used the word, until they have been surveyed, then the lands withdrawn, not having been surveyed, were not available for selection and the withdrawal deprived the company of no right. Plainly that is a false line of reasoning. Thought is not kept in balance if it leads to the conclusion that the Government may not justify its withdrawal of unsurveyed lands by the continued availability of a corresponding amount of unsurveyed lands.

It is submitted that the company is not in a position to maintain that it was deprived of its selection rights in the indemnity belts by the withdrawals in the forest reserve unless it can show that the available lands, whether surveyed or unsurveyed, which then remained, were not sufficient to satisfy the losses which it sustained within the primary limits. It has not made such a showing. Available unsurveyed lands were erroneously left out of consideration by the court below.

12. The court erred in disregarding subsequent restorations to the public domain and subsequent surveys in determining the invalidity of withdrawals within the second indemnity limits in Idaho

The decision in the *Forest Reserve* case, 256 U. S. 51, is based on the principle that, although the title to the lands in indemnity limits did not vest in the company before selection, the United States could not lawfully, under the Fifth Amendment, put itself in such a position that it could not perform its contract (p. 64). The time for performance of the contract would be when the company had put itself in position to demand performance by making selections. If at that time the United States had on hand, within the indemnity limits, an adequate amount of land of the kind required, the United States was not in default and no reason would exist for invalidating the withdrawal.

If a withdrawal was excessive, the remedy was to cut it down. If, however, before the critical moment for computation arrived the United States had restored to the public domain, within the indemnity limits, an adequate amount of land of the proper description no reason remained for cutting the withdrawal down. The result of the court's ruling to the contrary in this case is well illustrated by the situation in Idaho. On March 1, 1898, there were 434,063.37 acres in the second indemnity limits in Idaho. The company had 31,141.20 acres of unused losses satisfiable in such limits (Gov't Exs. 96 and 94 Revised, narrative statement, pp. 210,

212, unprinted). The United States therefore had a right to withdraw 402,922.17 acres provided it left 31,141.20 acres available for selection. On that date, March 1, 1898, the United States withdrew only 163,280 acres (R. 611), leaving 270,783.37 acres available to be surveyed and for selection. All these acres the company could have caused to be surveyed and from them could have satisfied its selection rights for 31,141.50 acres (Gov't Ex. 96, narrative statement, p. 212, unprinted). None the less, because there were only 25,500.72 surveyed acres then left the district court found a deficiency of 5,640.48 acres and treated the withdrawal of the entire 163,280 acres as invalid (R. 612, 611).

However, less then three years later, on December 31, 1900, either as a result of subsequent surveys or because surveyed lands were restored to the public domain, 47,513.59 acres of surveyed lands were on hand, out of which to satisfy 29,857.23 acres of subsequent losses and not more than 261.44 acres of prior losses (Govt. Exs. 95, 96, and 94 Revised, narrative statement, pp. 212, 210, unprinted). For this comparatively trifling and readily curable deficiency the entire withdrawal is held to be invalid and the company is decreed a right to compensation based on that invalidity. It is submitted that this is error.

The whole effect of it has not yet been stated. From 1900 until 1905 much more than a sufficient amount of surveyed land was available for satisfac-

tion of the company's losses (Govt. Exs. 95 and 96, narrative statement; p. 212, unprinted). It failed to select from them. Notwithstanding this, four subsequent withdrawals by the Government (R. 611, 612) have been held invalid and under the court's ruling the acreage of these subsequent withdrawals is added to the 163,280 acres from which the company can select the most valuable for purposes of deficiencies (R. 611, 613). These acres may be more valuable than the acres which they failed to select.

As the company did not have any title to lands taken into the forest reserve within the indemnity limits, it did not become entitled to compensation unless and until it showed that when the time for selection came and selection was made the United States did not have, at that time, an adequate amount of lands of the described kinds within the indemnity limits to meet those selections; and even then the company would be entitled to no compensation except for the then existing deficiency.

It was error to award compensation on account of lands withdrawn within the indemnity limits, on which homesteaders filed prior to June 5, 1924, and for which they received patents thereafter

As has been pointed out heretofore in connec-
on with other points, to entitle the company to
ompensation for any land under section 1 of the
ct of June 25, 1929, c. 41, 46 Stat. 41 (App. 148),
ie land must have been: (1) taken out and re-
oved from the grants, (2) on June 5, 1924, em-
raced within the exterior boundaries of a national
orest or other Government reservation, (3) avail-
ble to the company for indemnity selection, and
4) retained by the United States as part and
arcel of the Government reservations.

Before June 5, 1924, homesteaders had made en-
ies on 2,480.91 acres for which they received pat-
nts after that date (R. 628). Such lands do not
eet these statutory requirements of compensabil-
y. The homesteaders' titles were initiated by the
ntries. When the patents issued that title related
back to the date of the initiatory act." *Knapp* v.
lexander Co., 237 U. S. 162, 167. A homesteader,
y his entry and payment for his tract acquires a
ested interest in the land and a right to patent
hich the United States cannot deny to him ex-
pt for fraud or mistake, or because the
ntry was made without authority of law.
ornelius v. *Kessel*, 128 U. S. 456, 461; *Knapp* v.
lexander Co., 237 U. S. 162, 166–167, 169 (sem-
e); *Carroll* v. *Safford*, 3 How. 440, 460, 461

(semble). The same rule applies to mineral entrymen. *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 434. An equitable title has vested at once. *Exchange Trust Co.* v. *Drainage District*, 278 U. S. 421, 425; *Deffeback* v. *Hawke*, 115 U. S. 392, 405. After such an entry on unselected indemnity lands the company cannot acquire title by indemnity selection even if the selection is made before the filing. *Oregon, &c. R. R.* v. *United States*, No. 1, 189 U. S. 103, 112–115; *Osborn* v. *Froyseth*, 216 U. S. 571, 576; *Svor* v. *Morris*, 227 U. S. 524, 527. Under the Granting Act of July 2, 1864, it had been provided in section 6, and the company had agreed, that the indemnity lands should be open to preemption and homestead entry. *United States* v. *Northern Pac. Ry Co.*, 256 U. S. 51, 64–65; *Hewitt* v. *Schultz*, 180 U. S. 139, 145, 157. It has not shown that any of these lands were not validly opened to settlement at the time the entries were made.

As a result of these entries, before June 5, 1924, the United States had ceased to have power to retain such lands or to make further disposition of them. By that time such rights had vested in the homesteaders. Therefore, the lands were neither available to the company for indemnity selection nor "retained by the United States" as part of a Government reservation under the Act of June 25, 1929. It is submitted that it was error to award compensation for them (R. 629).

14. The company should have been required to account for the values it derived from lands mistakenly withdrawn from the public lands for its benefit between 1870 and 1890 and for profits it received from the sale of land which, under the Act of July 2, 1864, it was required to open to settlers at $2.50 per acre

The Act of June 25, 1929, directed a general accounting between the United States and the company with debits and credits both of lands and of values. The values to be charged to the company were those received in excess of the full amounts it was entitled to receive, either as a result of breaches of the terms, conditions, or covenants either express or implied of the granting acts, or through mistake of law or fact or misapprehension as to the proper construction of the grants or as a result of fraud. The Act specifically provides that the excess of value, if any, shall be charged against the company.

In this suit, brought under the direction of section 5 of that Act, the Attorney General, among other things, prayed (R. 82) for a judgment for the money due the United States by reason of the transactions set forth in subdivisions VII, VIII, XIII, and XXXII of the bill, all of which the court, following the master's report (R. 299, 369, 378), dismissed on the company's demurrer (R. 411–412).

Subdivision XXXII (R. 72) alleges the unlawful withdrawal of lands for the benefit of the company, but for which entries would have been made on place lands before the filing of definite locations

and on indemnity lands before selection by th company.

Subdivisions VII and VIII (R. 8–12) allege act of the company which contributed to its failure t permit settlement and preemption of the grante lands at $2.50 an acre, as it was obligated to th United States to do under the grant. Its failur to permit such settlement and preemption is al leged in subdivision XIII (R. 23). The relatio between these four subdivisions is so close tha they may be considered best together.

Illegal Withdrawals 1870–1890

Subdivision XXXII alleges that the granted lands had been illegally withdrawn for the benefi of the railroad when they should have remained open to settlement, and that in consequence the company received many lands which otherwise it would not have obtained. The illegal withdrawals were of two kinds. One was of lands in the place limits. These withdrawals were made upon the filing of general route maps, and before maps of definite location were filed. They were held illegal in *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108 (1903). The other was of indemnity lands which were withheld for the railroad's benefit as soon as maps of definite location were filed. These were held illegal in *Hewitt* v. *Schultz*, 180 U. S. 139.

In respect to both kinds of illegal withdrawals, the decisions holding them invalid came too late to prevent the railroad from getting the full benefit

of them. Thus the place lands were withdrawn and held for the railroad until the maps of definite location were filed, at which time the railroad got them. Had the withdrawals not been made, many of these lands would have gone to settlers. The same was true of the indemnity lands which were illegally withdrawn and held for the railroad's benefit.

The master reported that this subdivision of the bill should be dismissed because the mistake was the mistake of the Government and there was no allegation that it was induced by fraud of the railroad and because the railroad received no advantage from the mistakes and the Government was not injured by them (R. 369).

It is submitted that the master erred. In this grant, the United States was acting not as a private contractor for its immediate commercial benefit, but as a Government carrying out a public policy for the benefit of all. The United States was looking out for the public welfare when, in return for the grant, it required of the company an undertaking that these lands should be open to settlement and preemption at $2.50 an acre, as alleged in subdivision XIII (R. 22), and ordained that the place lands should remain open to preemption and settlement up to the time of definite location, and that indemnity lands should so remain until the company made an authorized selection. These provisions were designed to make the lands available, without inordinate profit to the company, to the

people of the United States who might wish to settle upon them. The same policy was carried out in contemporaneous legislation as to other railroads. *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549. The company should not be permitted to profit by defeating it. Although injury to the money interests of the United States is not essential to a remedy here there was such an injury.

The company was not granted land by quantity but by description, *infra,* pp. 208–213. The lands granted were such of the nonmineral public lands in the place limits as were not taken up at the time maps of definite location were filed, and such indemnity lands as were not taken up before selection, *Southern Pacific Railroad Co.* v. *Bell,* 183 U. S. 675, 689. If the company chose to delay, and lost lands in consequence, it alone was to blame. *Cedar Rapids &c. Railroad* v. *Herring,* 110 U. S. 27, 41. Lands taken up by homesteaders or preemptors meanwhile would bring money directly to the United States. Difficulties of proof go to the amount and not to the fact of financial injury. It would reach into the millions.

On the other hand, the company profited greatly as a result of the erroneous withdrawal of these lands. It saved all carrying charges on the lands during the full period of its dilatory inaction and, having avoided that burden, received the benefits of advancing values as the country developed.

These erroneous general route withdrawals were tremendous in area. They covered a strip 40 miles

wide in the states and 80 miles wide in the territories. In Minnesota, by a general route withdrawal, over 1,000,000 acres were held for the benefit of the company for approximately one year. In North Dakota over 8,000,000 acres were withdrawn by a general route withdrawal on March 30, 1872. Approximately half of this was wrongfully held for the company for a year, and 4,000,000 acres were held for eight years. In Montana 11,000,000 acres were wrongfully withdrawn following the filing of maps of general location in 1872. These acres were wrongfully held in a reserved status for eight to eleven years. In Washington 7,000,000 acres were wrongfully withheld from three to fifteen years. All told approximately 30,000,000 acres were held in a reserved status and unavailable to settlement for periods ranging from one to fifteen years. (Unprinted Govt. Exs. 85, 88, 90, and 98, and Statement of Land Grants prepared by the General Land Office, pp. 14–15.)

An examination of the government exhibits discloses also large acreages received by the company within areas in indemnity limits withdrawn upon the filing of the maps of definite location. In Minnesota in the first and second indemnity limits by December 31, 1887, the company had selected approximately 700,000 acres of land. Some 600,000 acres of these had been held unavailable to homesteaders under a withdrawal for the benefit of the company made in December 1871, and not revoked until 1887, a period of approximately 16 years. The

balance was withheld from settlement for a period of about four years. In North Dakota in the first indemnity limits by December 31, 1887, the company had selected over a million acres. Withdrawals had been made in 1873 and 1880. The lands were thus improperly withheld from settlers for a period of either seven or fourteen years. In Montana, by December 31, 1887, the company had selected approximately 670,000 acres of land in the first indemnity limits. Withdrawals were made in 1883, 1884, and 1885. These withdrawals were in effect three or four years. In Washington, by December 31, 1887, the company had made selections of approximately 600,000 acres which were held unavailable to settlers for a period of from two and one-half to seven years. In Oregon, by December 31, 1887, the company had made selections of approximately 200,000 acres in an area withheld from settlers for approximately two and one-half years. (Unprinted Govt. Exs. 85, 88, 90, 98, and 100, and Statement of Land Grants prepared by the General Land Office, pp. 14–15.)

The full extent of the injury to the United States and of the unjust gain to the company may be incalculable, but that it is vast is beyond question. By striking out the allegations the court prohibited the proof.

It is safe to say that in 1870 no Northern Pacific grant whatever would have been made had it not been understood by Congress that provision had been made for protection of the settlers. Had the

proponents of the grant attempted to insert clauses authorizing these general route and indemnity withdrawals which excluded settlers, and benefited the railroad, the grant would have been denied. Yet the withdrawals were made.

Why the Government had a just interest in protecting the settlers became manifest later when the effects of the illegal withdrawals upon the settlers were made known. In the report of the Commissioner of the General Land Office submitted with Secretary Lamar's report of November 1, 1885 (H. Ex. Doc. 1, pt. 5, Vol. 1, 49th Congress, 1st sess., pp. 155, 178–189), attention was called to the illegal withdrawals. The commissioner then stated (p. 179): "In most, if not all, cases of railroad grants premature and unauthorized withdrawals have been made, the land held sacredly reserved for the railroad, and the legal rights of settlers arbitrarily and cruelly denied. The number of settlers having indisputable legal right to the lands occupied by them who have been forced to buy their homes of railroad companies or suffer eviction because of official declarations of superior railroad right founded upon constructive withdrawals made before any railroad right had actually been acquired, can never be ascertained, since their applications for the most part died at the local offices, and the general failure of those who applied prevented even the assertion of rights by others. * * * (p. 181): This class of withdrawals has made rail-

road construction dependent upon the will and convenience of the companies, for, the lands being reserved to await their pleasure, they lost nothing through delay. The object of the grants—early construction of roads and their completion within reasonable time—has thus been defeated. Roads are unfinished today for which grants were made twenty years ago and longer, and where the time for completion expired from five to fifteen years since and forfeitures have been incurred, but lands within their indemnity limits still remain withdrawn."

Comment similar to that contained in the foregoing Commissioner's report was made by President Cleveland. His letter dated April 25, 1887, was attached to the report of the Secretary of the Interior made in response to a Senate resolution, S. Ex. Doc. No. 254, 50th Congress, 1st sess., at page 59. The Department rule prohibiting settlers from initiating entries appears in this report at page 27. This report contains the record in the *Guilford Miller* case 7 L. D. 100, and is a practical demonstration of the Commissioner's statement that the average settler was without recourse.

Company's breach of $2.50 obligation

In violating its agreement and the proviso of the grant, that after July 4, 1884, the granted lands should be subject to settlement and preemption at $2.50 per acre, the company profited by

its wrongdoing to the extent of the sums it received in excess of that rate per acre, and the people of the United States who would have received these lands at that price, sustained a corresponding loss. The dismissal of subdivision XIII prevented proof of the amount of the profits improperly received from this source.

In the language of *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 559: "The interest that the granting acts conferred upon the Railroad Company was $2.50 an acre. That secured to it, 'all the value the granting acts conferred' upon it was secured."

Subsequent events have shown that the railroad cost approximately $68,000,000.00 and its equipment approximately $34,000,000.00 (R. 200). The lands described in the gift exceeded some 40,000,000 acres, an area larger than that of the two States of New York and New Jersey combined and about equal to that of the six New England States. This at $2.50 an acre would be $100,000,000.00, almost enough to build and to equip the railroad. The company already has received for these lands over $200,000,000 (R. 36). Thus it is no mere figure of speech to say that the United States built this railroad.

The stricken allegations are that there were many million acres subject to the proviso on July 4, 1884, five years after the date set for completion, and that none of them were opened to settlement and

preemption at $2.50 but that instead they were sold by the company subsequently at its own prices (R. 23). For the purposes of demurrer, these are the facts, regardless of all that the master has said to the contrary. *Angle* v. *Chicago, St. Paul &c. Railway,* 151 U. S. 1, 10. They are important facts in this accounting.

The master stated, as reasons for sustaining the demurrer to subdivision XIII (R. 22), that the proviso related only to the lands granted by the Resolution and not by the Act, that it did not apply to lands remaining subject to a subsequent mortgage and that if did not require any action by the company (R. 372–378). It is submitted that these reasons are unsound and that they do not justify sustaining the demurrer.

The Act of July 2, 1864, contemplated one issue of capital stock to furnish the money to build the railroad. Any mortgage was prohibited. Manifestly, this was to guard against having mortgage money build the railroad, thereby leaving all of the proceeds of the stock and the land subsidy to go to the promoters and organizers as profits. The Resolution of May 31, 1870, is to be construed in this light. It authorized one mortgage, to raise money to build the railroad, which one issue of stock had failed to provide. It made no segregated grant of land. It changed main line into branch and an extended branch line into main line. It granted no separate land subsidy for this. The only grant

one for the whole road from Lake Superior to
get Sound "with the * * * grants * * *
vided for in its act of incorporation." This
a unit. To it alone the proviso applied, and as to
equired "That all lands hereby granted to said
pany which shall not be sold or disposed of, or
ain subject to the mortgage by this act author-
, at the expiration of five years after the com-
ion of the entire road, shall be subject to
lement and preemption like other lands, at a
e to be paid to said company not exceeding
dollars and fifty cents per acre." (App. 58.)
nquestionably, it is submitted, the lands sub-
to the proviso were all the lands of the grant
n Lake Superior to Puget Sound and the same
ls which might be subjected to the one "mort-
e by this act authorized." No reason for a dis-
tion exists. On July 4, 1884, that mortgage
been foreclosed and the company held the lands
ncumbered by it (R. 20, 13–21).
he evident plan of the Resolution was that in
construction stages the company should be able
aise money for construction, either by sales or
r disposition of the granted lands or by a mort-
e, but that the land should not remain barred
r preemption and settlement after July 4, 1884.
ny of the land then remained subject to the
tgage, the $2.50 per acre was to be substituted
the land as security for the mortgage. *Oregon*
al. R. R. Co. v. *United States*, 243 U. S. 549,

560; dissent in *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 67. This was evident to any prospective mortgagee.

The words of the Resolution, the purpose of Congress and the history leading up to enactment all confirm this analysis (Cong. Globe, 41st Cong., 2d sess., p. 2868). Only one mortgage, a construction mortgage, was contemplated. Five times it is mentioned in the Resolution and always in the singular. The authorization was in derogation of an existing prohibition in the original act and should not be enlarged unnecessarily.

But even if this were not so, still any subsequent mortgage would be subject to the same proviso, that after July 4, 1884, money payments at $2.50 per acre were to be substituted for land. No mortgage need be an obstacle to this. It was unlawful for the company to impose any such obstacle. Of a substantially similar provision in *Oregon and Cal. R. R.* v. *United States*, 238 U. S. 393, 421, the court said: "If the language may be said not to impose 'an affirmative obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made." Yet the company says in substance that it can prevent this preemption and settlement at $2.50 an acre after July 4, 1884, by the simple device of putting on a subsequent mortgage without a partial release clause at $2.50 an acre. The mortgage beclouded the settlers' rights to enter and to obtain the land at $2.50 an acre. The company

deliberately and unnecessarily violated the proviso by interposing this obstacle.[1]

The present case differs markedly from *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, in which the expressed power of the Union Pacific Railroad Company to dispose of land was held sufficient to permit a mortgage despite the absence of the word mortgage from the language there used. In this case until May 31, 1870, the Northern Pacific Railroad Company was prohibited by the express terms of the Act of 1864 to mortgage the land. Then it was given a limited power to mortgage, but with this express proviso as to settlement and preemption. The contrast is made in the proviso itself. During construction and until July 4, 1884, the corporation may do any one of three things, (1) sell or (2) dispose of or (3) mortgage; but what remains thereafter is to be opened for settlement and preemption.

This analysis of the effect of the proviso in this case makes it unnecessary to dwell upon the strong

[1] By 1870 Congress had adopted a policy of having the public lands go preferentially to settlers, 238 U. S. 393, 416; Cong. Globe, 3d Sess., 40th Cong., p. 1821 and H. B. 1998; S. B. 349, Vol. 3, 570, Vol. 4, 41st Cong., 1st sess., H. B. 393; S. B. 107, Vol. 1, 41st Cong., 2d sess., H. B. 580, 678, 882, 1082, 1312, 1515, 1590, 1756, 1830, 1874, 1877, 2056, 2137, 2274, 2399; S. B. 396, Vol. 3, 268, Vol. 2, 168, Vol. 2, 566, Vol. 4, 55, Vol. 1, 1011, Vol. 7, 41st Cong., 3d sess., S. B. 483, Vol. 3, 42d Cong., 1st sess., H. B. 59, 128, 137, 138, 261, 317, 371, 370. Copies of the House bills may be found in the library of the House and of the Senate bills in the Senate document room.

and convincing dissent in the *Platt* case, 99 U. S. 66. This dissent gains support from *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 560.

The company accountable for illegal profits

The facts alleged in subdivision XIII (R. 22) and XXXII (R. 72) are relevant and important to the accounting sought by this suit. It was error to strike them out.

By violating its obligations to the United States and the conditions of the grant, the company has obtained an unlawful profit for which it should be charged in accounting with the United States.

The United States was entitled to an injunction to prevent the company from violating these obligations. *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393, 421, 436. In a court of equity the "illegal emolument," resulting to the company from this violation should enure to the United States. It is both unlawful and inequitable that the company should keep these fruits of its own wrongdoing.

Congress never intended to give to the company all of the great value there might be in these lands. The limit of the gift was $2.50 an acre, *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 559, or a total of over $100,000,000, enough to build and equip the railroad. The rest of the land value was received by the company in trust for the people of the United States, who might wish to acquire it at

$2.50 an acre. Owing to the company's misconduct in ignoring its obligation, the trust has failed of perfect accomplishment. Consequently a resulting trust arises in favor of the donor, the United States. Where the defendant receives property which in equity and good conscience he should hold for another, he becomes a constructive trustee of it. *Angle* v. *Chicago, St. Paul &c. Railway,* 151 U. S. 1, 26; *Moore* v. *Crawford,* 130 U. S. 122, 129. The trust attaches to the lands and to their proceeds. *Hopkins* v. *Grimshaw,* 165 U. S. 342, 355; *Chater* v. *Carter,* 238 U. S. 572, 586.

Unjust enrichment such as that achieved by the company here gives rise to an equitable right of recovery which may be remedied by an action at law, where the enrichment has been turned into money, thus unjustly had and received. See *Stone* v. *White,* 301 U. S. 532, 534. When the company sold the lands for more than $2.50 an acre in violation of its obligation to the United States it stood, with respect to the proceeds, in a position analogous to that which it would occupy if it had received a patent to lands to which it was not entitled under the contract, and then had sold the lands. In such a case the United States had the right to obtain the proceeds from the company by a suit at law. *Southern Pacific* v. *United States,* No. 1, 200 U. S. 341, 353; *Jones* v. *United States,* 258 U. S. 40, semble.

The Act of June 25, 1929 does not contemplate that the company should retain this profit without accountability to the United States.

Either these substantial breaches of contract and of trust should be treated as a bar to the company's right to have compensation for the lands taken into the forest reserves, or these improper profits should be treated in the accounting as a charge to the company and a credit to the United States.

In the Act of June 25, 1929, Congress has laid down a law which, removing procedural obstacles, requires that the rights of the United States and of the company be balanced and that the judgment resulting therefrom be reported to Congress pursuant to section 8 for the enactment of such legislation as may be deemed desirable in the interests of the United States in connection with the execution of the decree or otherwise. If the company receives compensation for the 1,453,061.02 acres and is permitted also to keep the huge profits made by the breach of its trust and of its covenant to the United States, without any accountability to the United States therefor, the accounting will not be the just accounting required by that Act.

As alleged, the profits from the sales of these lands, in violation of the company's covenant to the United States to open them for settlement and preemption at $2.50 an acre, exceeded two hundred million dollars (R. 36). On demurrant motion to strike, these allegations are to be taken as true,

Angle v. *Chicago St. Paul &c. Railway,* 151 U. S. 1, 10, and clearly should not have been stricken out.

Section VIII of the decree (R. 644) states:

> This decree shall be without prejudice to the contentions which either party may properly raise in the proceedings for determination by the court of the amount of compensation to which either party may be entitled.

Subdivisions VII, VIII, XIII and XXXII of the bill assert contentions bearing directly upon the amount of compensation. In order to enable the United States to make these contentions, the order (R. 412) dismissing these subdivisions should be reversed.

On this point, in its underlying conception, the Act of June 25, 1929, c. 41, 46 Stat. 41, providing for this accounting is like the Chamberlain-Ferris Act of June 9, 1916, c. 137, 39 Stat. 218, which afforded a remedy for the violation of the $2.50 obligation of the Oregon & California Railroad Company. It is described in *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 557–560. This Court held it valid. By the terms of that act, for breach of the $2.50 obligation, the United States resumed title to the unsold lands and a general accounting suit was ordered. In that accounting the company's interest in the lands sold and unsold was to be deemed no more than $2.50 an acre (243 U. S. 559). The mortgagee was to have no greater interest (243 U. S. 560). So here, under

the Act of June 25, 1929, the claims of the company to indemnity selection rights are forfeited to the United States, and there is to be a general accounting suit. In this suit (sec. 6), "The court * * * shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies or either of them * * * and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court." This directs that, if as a result of the breach of the proviso for settlement and preemption at not exceeding $2.50 an acre, *supra,* p. 13, the company has received any excess money, it is to be charged against the company in the decree. In *Oregon & Cal. R. R. Co.* v. *United States,* 243 U. S. 549, 560, this Court has held that it is lawful for Congress to require this.

The United States asked for such a decree (R. 81–82) on the allegations of subdivision XIII (R. 22). To dismiss these allegations (R. 412) was error.

5. The court was correct in denying the company's claim for compensation on account of lands claimed by the company to be within second indemnity limits opposite the railroad between Portland, Oregon, and Tacoma, Washington

The company claims compensation for 196,761.66 acres (R. 620, 660, 661) within what the company asserts to be the second indemnity belt, under the Resolution of May 31, 1870, opposite the railroad from Portland to Tacoma. The decree denies this claim (R. 620), and the company seeks to reverse the decree to the extent that it does so.

The United States submits that this action of the the court was right for three reasons: (1) The grant was not deficient in the place and first indemnity limits at the date of final location of this road. (2) The Joint Resolution of May 31, 1870, did not authorize the establishment of second indemnity limits opposite the road between Portland, Oregon, and Tacoma, Washington. (3) This portion of the road has never been completed into the main line contemplated by the Resolution and therefore the company never acquired a right to make these indemnity selections.

The first of these reasons was approved by the court because of the court's conclusion that the company was not entitled to make indemnity selections in substitution for the lands which it had actually received within the area described as the Tacoma overlap. (R. 620, Conclusion (b).) This

was in accord with the conclusion reached by the master (R. 528, 508–519).

If the action of the court is approved on this ground, as the United States submits that it should be, consideration of the additional grounds for affirming the decree on this point becomes unnecessary.

The second ground rests on the words and purposes of the Resolution. The language authorizing second indemnity limits authorized them only "on each side of the road, beyond the limits prescribed in said charter" and only to "the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter." The charter of July 2, 1864, did not cover the railroad between Portland and Tacoma. The purpose of the second indemnity was limited to covering losses which had occurred since the date of the charter, chiefly as a result of settlement entries made since that date. Hence it did not extend to losses with respect to lands opposite parts of the road later authorized.

The third ground is that the only condition on which the company could become entitled to indemnity selections opposite the line between Portland and Tacoma was that it should complete the whole railroad from Lake Superior by way of the valley of the Columbia River to Puget Sound. The company has never completed that main line. Although it ostensibly built the road from Portland to Tacoma as a part of the main line it has always

remained actually only a branch and Congress had made it plain that the company was to receive no land subsidy with respect to this branch line outside a right-of-way.

The statements on page 12, lines 5–8, of the company's brief filed in No. 477 to the effect that the existence of losses is undisputed ignores these considerations and ignores also the position of the United States set out under points 1, 4, 5, 8, and 9, *supra*. For the reasons stated in the discussion of those points, such unsatisfied losses are disputed. Likewise indefensible is the statement in the first six lines of page 6.

1. No deficiency in the grant

The road from the east to Tacoma was finally definitely located in 1884. It entered Tacoma at nearly a right angle to the road between Tacoma and Portland. The strip of land to the south of the line from the east, described and granted in the Act of July 2, 1864, overlapped the strip of land, if any, described in the Resolution of May 31, 1870, to the east of the line between Tacoma and Portland. The odd-numbered sections within this overlap amounted to 637,580.99 acres (R. 616, para. (e)).

The company contends that it became entitled to select this number of additional acres within second indemnity limits to the extent defined in the Resolution of 1870 (R. 660). It is submitted that the court was correct in ruling (R. 620) that the

company had no such right because it suffered no loss of any of the acres described in the Act or in the Resolution as a result of this overlap. The right to select from second indemnity limits was to make up for lands not available within the basic grant because previously they had been so granted, sold, or reserved as to make it impossible for the company to have them. The sections within the overlap had not previously been so granted, sold, or reserved as to make it impossible for the company to have them. The company had them. Therefore, it could not qualify for indemnity on the ground that it lost them.

At page 31 of its brief filed in No. 477, the company begs the whole question in the assertion that there was not in Washington a sufficient area available for selection to satisfy the grant. This assertion is based on the assumption that it was entitled to twice the area of the granted lands within the overlap. It says that where section X in the overlap was granted, the company was entitled to two sections, namely, X in place and Y for indemnity because it did not get X.

The brief for the company throughout is built on ignoring the terms of the Act and Resolution as a consistent whole and in treating the grant as a quantity grant and not a grant by description.

The terms of the Act answer the company's contention. The company's only right to select indemnity lands (sec. 3, 13 Stat. 365, App. 41) for place lands, is by the term of the Act, a right to

select "in lieu thereof." If the company actually has and keeps the section granted, another section cannot be "in lieu thereof." The object of the Act of July 2, 1864, in the granting section 3 was that the company should have every alternate section within the described place limits. If the company obtained all these sections, it had no right to go to the indemnity limits for more "in lieu" of those it already had.

The Resolution of 1870 made no primary grant of place lands separate from that made by the Act of July 2, 1864, which it supplemented. The company's brief on page 36 not only is in error as to this but is unwarranted in asserting in line 10 of that page that there is no dispute about it. The only primary grant in the Resolution was contained in the words "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation," namely, the Act of July 2, 1864, 13 Stat. 365 (App. 35).

That Act had provided for a main line and for a branch. Where the branch departed the main line an overlap was inevitable. It turned out to be at Pasco. It is inconceivable that the company could have indemnity for the sections within that overlap created by the original single Act. *United States v. Oregon &c. Railroad Co.*, 164 U. S. 526, 537. The company does not suggest any such claim. Its claim here that it should have twice the amount of land within the overlap which resulted later from the combined effect of the original act

and the supplementary Resolution of 1870, 16 Stat. 378 (App. 57), rests upon no stronger basis. The Resolution of 1870 turned the proposed branch line down the Columbia River into a main line and extended it from Portland to Puget Sound. It turned what had been the proposed main line across the Cascade Mountains into a branch line. The lines were just the same in the Act and in the Resolution except for the extension from Portland to Puget Sound. The extension created an overlap at Portland and at Tacoma, no different in character from the overlap created at Pasco by the original Act. If the overlap at Pasco did not create a right to make indemnity selections, there is no reason why the overlap at Portland or at Tacoma should create any such right. To give the company such a right would be to give it something more than was given it at Pasco "in its act of incorporation."

If the Act of July 2, 1864, had given the right to extend the railroad from Portland to Puget Sound plainly there would be no greater rights of indemnity selection because of the overlaps at Portland and Tacoma than at Pasco. The fact that this extension was authorized by the later Resolution rather than by the original Act does not change the result.

The Resolution of May 31, 1870, was clearly in *pari materia* with the Act of July 2, 1864, *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 9,

and the two "are to be construed accordingly rather than as distinct enactments." *Employers Corp.* v. *Bryant*, 299 U. S. 374, 380; *United States* v. *La Franca*, 282 U. S. 568, 576; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 362; *Blair* v. *Chicago*, 201 U. S. 400, 475; *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 44. They are not antagonistic.

Whether the Resolution and the Act be read separately or together, what Congress has done is merely to grant the specifically described sections within the overlap to one grantee. The grantee has them and has lost nothing.

The decisions of this Court which permit a junior grantee to have indemnity for sections which that grantee has actually lost to another senior grantee have no bearing on the case at bar.

The statements in the first and second lines on page 38 of the brief for the company in No. 477 that in the *Barney* case (*Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618), indemnity was given for loss of lands in an overlap, is an inadvertent mistake. In that case the court, dealing with senior and junior overlapping grants to one grantee denied indemnity for the overlapped sections. In the opinion the Court, by Mr. Justice Field, said (p. 627): "The grant by the act of 1857 is one of description, that is, of land in place and not of quantity." * * * (629) "The court below therefore erred in holding that the Winona Company

was entitled to ten full sections where such interference occurred, without deducting the lands previously granted to the State."

Barney v. *Winona &c. Railroad Co.*, 117 U. S. 228, repeats the statement that the grant is one of description and not of quantity.

The description in the Act of 1864 "every alternate section * * * designated by odd numbers, to the amount of twenty alternate sections per mile," when translated to the ground, is a specific description of 20 parcels of land as definite as if the metes and bounds of such sections throughout the entire place belt had been given. For the line between Tacoma and Portland, if the company was entitled to any of these overlapped sections, it got them, without need to rely on the grant of May 31, 1870. It already had them by the grant of July 2, 1864. In *Wisconsin Central R'd Co.* v. *Forsythe*, 159 U. S. 46, this Court, by Mr. Justice Brewer, said (57–58): "When Congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands? * * *" (59) "can there be any doubt that Congress intended by this first section of the act of 1864 merely an enlargement of the grant made by the act of 1856 from six to ten sections * * * ?" (60) "* * * when it [Congress] prescribes that those lands shall be alternate sections along the line of the improvement, it is

equally clear that the intent is that if possible the beneficiary shall receive those particular sections."

With respect to the lands within the Tacoma Overlap, the Resolution of 1870 added to the Act of 1864 made of the whole action of Congress one grant of specifically described land, accomplished by two consistent steps.

The company urges at page 42 of its brief in No. 477 that this Court indicates in *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, that there would be a right to indemnity for the overlap. This contention is without merit. In *United States* v. *Oregon &c. Railroad Co.*, 176 U. S. 28, 50, this Court had said that, as the grant of 1864 to the Northern Pacific Railroad Company failed for lack of definite location from Wallula to Portland and for no other reason, and the grant of 1866 to the Oregon and California Railroad Company was senior to the grant of 1870 to the Northern Pacific Railroad Company, the former would get land, and the latter would be entitled to indemnity for what it lost, from the 1870 grant, as a result of the 1866 grant to the Oregon and California Railroad Company. When *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, was in the circuit court of appeals, that court, in dealing with a wholly different point, questioned whether the Northern Pacific Railroad Company in order to obtain for itself overlapped lands under the 1870 grant should be permitted to question the sufficiency of its own maps as a sufficient location of these lands under the grant of

1864. If it could not question their sufficiency, the lands would have passed to the company under the grant of 1864 and by the General Forfeiture Act of September 29, 1890, c. 1040, 26 Stat. 496, they would have been forfeited to the United States for failure to construct. *United States* v. *Southern Pacific R'd*, 146 U. S. 570. Therefore the certificate of the circuit court of appeals said (193 U. S. 1, 8) "this case is ruled by the decision of the Supreme Court in the case above referred to [176 U. S. 28], unless the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both of said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864." This Court answered to this question, 193 U. S. 9: "We do not think the fact that the Northern Pacific Company was the grantee in both grants limits the force of this decision." This means nothing about indemnity but means only that the company is not estopped to show that the General Forfeiture Act did not forfeit these lands to the United States for failure to construct, because nonlocation had prevented the passage of any title to be forfeited. This being so, the second grant of them, that of 1870, carried them to the Northern Pacific Railroad Company. This could not have been so, if they were excepted from the second grant. The language of this Court, just quoted, does not mean, as the company suggests, that the Northern Pacific Railroad Company, although it got every acre of

these lands and lost none of them, was entitled to indemnity for a loss which it never sustained. The true import of the decision is just the reverse. The Court said (193 U. S. 9): "The resolution of 1870 and the act of July 2, 1864, were in *pari materia*, and no reason is perceived for holding the act operated to exclude from the subsequent grant by the resolution."

The company's brief in No. 477, pp. 43–47, refers to an adjustment made by the Commissioner of the General Land Office and approved by the Secretary of the Interior with respect to the Southern Pacific overlap. The circumstances of that grant were altogether different, as the second grant in that case was made for an entirely different railroad system (16 Stat. 573). If, however, on dissection, the record in that case should bear out the company's contention, it is submitted that the decision of the Commissioner of the General Land Office in that case should not be followed by this Court. The question is not one of fact or of administration, as to which administrative officials would have peculiar knowledge. It is the interpretation of an Act of Congress best made by a court.

When computing the total number of sections described, each section in an overlap is to be counted as one and not as two. This does not mean that any section described in either part of the grant is excepted from the other. It is a case of granting the same parcels to one grantee in two

steps. If the first step takes effect there is no work for the second to do. If it does not take effect the second does the work. This is the necessary result of the decision in *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, as to the Portland overlap and of the decision in *Wisconsin Central R'd Co.* v. *Forsythe*, 159 U. S. 46.

Therefore, the company has lost no lands from the overlapped area by reason of the overlap.

It is submitted that the subject was covered completely by what this Court said in *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 627: "The grant by the act of 1857 is one of description, that is, of land in place and not of quantity."

The decision of the district court that the company was not entitled to any indemnity for a loss by reason of the Tacoma overlap was right.

2. The Joint Resolution of May 31, 1870, did not authorize the establishment of second indemnity limits opposite the railroad between Portland, Oregon, and Tacoma, Washington

By the Resolution of May 31, 1870 the conditions to second indemnity were that there should not be "the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter." Its charter was the Act of July 2, 1864. That charter set some limits to the lands granted, whether place or indemnity lands. Those limits were in substance the boundaries of a forked rectangle upwards of 2,000 miles long and 100 miles

wide. The land which the company could get was just as much limited by the end lines as it was by the side lines. The easterly end line was at Lake Superior. The westerly end lines were at Puget Sound and at or near Portland, respectively. Within that plat of ground there were no lands between Portland and Tacoma except for the fifty miles north of Portland and the fifty miles south of Tacoma. There is nothing in the act which expands the "limits prescribed by its charter" beyond that forked rectangle. If the railroad company could have conveyed and had conveyed all the lands granted to it "within the limits prescribed by its charter," it would have conveyed nothing outside that forked rectangle. The Resolution did not say "within the lateral limits." It said "within the limits." This is contrasted with the more defined limits which were to bound the indemnity grant, to be "within ten miles on each side of said road, beyond the limits prescribed in said charter." "Each side" is the language chosen when the object is to express what should be the lateral limits of the second indemnity rectangle.

The literal interpretation of the resolution excludes any second indemnity between Portland and Tacoma.

The object of the grant is consistent with this exclusion. The object of the grant was to secure an east and west railroad from Lake Superior to Pacific tidewater points. The land grant was a

furtherance of this purpose. There was no occasion, in order to accomplish this purpose, to make a land grant to a north and south railroad between Portland and Tacoma.

Consistently with this east and west purpose, on April 10, 1869, Congress permitted the company to have a line from Portland to Puget Sound. It expressly provided that the company should have no land grant on account of this north and south line.

In 1870, it was an evident probability that many settlers had entered the lands along the route from Lake Superior to Puget Sound and to Portland in expectation of the coming railroad. This influx would be along the line projected by the Act of July 2, 1864, and because of that line, and not elsewhere. The influx might well be so great that the first indemnity limits would not be adequate to care for the losses from the place limits. In order to care for this possible deficiency, provision was made in the Resolution of May 31, 1870, for second indemnity limits to care for the shortage created by the losses subsequent to July 2, 1864, along the line prescribed by the Act of July 2, 1864, namely, "within the limits prescribed by its charter." There was no other reason for choosing the beginning date of July 2, 1864.

If it had been intended to give second indemnity to the line between Portland and Tacoma, first subsidized by the Resolution of May 31, 1870, to be consistent, the beginning date for such losses would have been May 31, 1870. No settlers would be sup-

posed to have rushed to that area because of a projected line of railroad before that line was ever projected.

Both the literal construction of the words used in the Resolution and the objects to be accomplished and the troubles to be met converge to the point that the second indemnity limits were provided only for the line that had already been an immediate project for six years.

The land grant of 1864 and the supplement of 1870 covered separate areas. *United States* v. *Northern Pacific R'd Co.*, 152 U. S. 284, 292–294; *Northern Pacific Railway* v. *DeLacey*, 174 U. S. 622, 626, 628.

It would be purposeless to say in the Resolution of May 31, 1870, "to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four," if it were not for the reason just above stated.

This becomes doubly clear on resorting to the debates in Congress. These debates are printed in full in Volume 5 of the Record of Hearings before the Joint Congressional Committee on investigation of the Northern Pacific land grants, pp. 4817–5086.

The Joint Resolution as reported by the Senate Committee contained the language "under the provisions and with the privileges and duties provided for in its act of incorporation and the amend-

ments thereto." Cong. Globe, 41st Cong., 2d sess., p. 1584, 6 L. D. 402, J. C. R. 4818.

Senator Howard of Michigan, Chairman of the Senate Committee on Pacific Railroads who sponsored the resolution, moved to strike out the words "and the amendments thereto" so as to make sure, he said, that the new line from Portland to Puget Sound "will be entitled to the subsidy in lands" provided for in the Act of July 2, 1864. Cong. Globe, p. 2583, J. C. R. p. 4908. The change was agreed to. Cong. Globe, p. 2842, J. C. R. 4934. Senator Howard in the course of his remarks said: "This resolution only authorizes the company in cases where lands which otherwise would have belonged to the company have been taken up by settlers on homesteads to go beyond the limits of the odd sections to the extent of 10 miles on each side of the road to make up the deficiency." J. C. R. p. 4819, Cong. Globe, p. 1585. "The fact that the lands have been taken from time to time by settlers, by preemptors, and homestead owners, is one which of course would occur to the mind of every Senator. Whenever it is supposed a line of road is about to run, or will run, settlers are likely to go and squat on the lands and take them under the preemption act or homestead act. All the bill contemplates is to make good to the company the arrangement which the Government entered into in 1864, as to the quantum of land to be given to the company." J. C. R. p. 4823, Cong. Globe, p. 1624. "Since the enactment of their charter many of these lands have

been taken up by settlers and in other ways, and the land fund which we agreed to furnish them has become somewhat diminished in value; and especially, as I am informed, is this the case near the eastern terminus of the line in the State of Minnesota. It is particularly in reference to that portion of the line which lies between Lake Superior and the Mississippi River that the company is anxious for these additional lands in order to make up deficiencies which have occurred by purchases by settlers and homestead claimants." J. C. R. pp. 4868–4869; Cong. Globe, p. 2546. "All that this company, therefore, asks is in substance this: that the Government shall fulfill its undertaking with the company and shall, so far as practicable, so far as reasonable, grant to them the lands which were originally stipulated to be donated to them. Some years have elapsed, and during those years many of the lands to which the company would otherwise have been entitled have been taken up by settlers and purchasers." J. C. R. p. 4921; Cong. Globe, p. 2837.

Senators Pomeroy, Corbett, and Wilson made similar remarks in support (J. C. R., pp. 4892, 4912–4913, and 4915; Cong. Globe, pp. 2577, 2833–2834).

Mr. Wheeler, Chairman of the House Committee on Pacific Railroads, in his exposition of the resolution on the floor of the House said: "* * * the company asks to have made good to them the lands originally granted, and no more. This bill makes

up the deficiency which has been created since the original charter by reason of grants to individuals, homestead settlers, and preemptors, for lands which have been taken in expectation of the building of this road, which has alone made them available," J. C. R., p. 4958, Cong. Globe, p. 3263. Mr. Blair spoke to the same effect, J. C. R., p. 5013, Cong. Globe, p. 3791.

The propriety of considering the interpretation in the debates of the sponsors is recognized. *Wright* v. *Vinton Branch,* 300 U. S. 440, 463; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 536; *Duplex Co.* v. *Deering,* 254 U. S. 443, 475. Contrary views of those in opposition, such as here, were expressed, J. C. R., p. 4919, Cong. Globe, p. 2836, strained for oppositional purposes, cannot carry the same conviction. *Aldridge* v. *Williams,* 3 How. 9, 24; *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318; *Duplex Co.* v. *Deering,* 254 U. S. 443, 474.

It is believed that the Court has not been called upon heretofore to decide whether this second indemnity limit applied to the new grant of May 31, 1870, between Portland and Tacoma. On November 24, 1908, First Assistant Secretary Pierce advised the Commissioner of the General Land Office, 37 L. D. 272, that the Resolution of May 31, 1870, made a grant of second indemnity lands along the line between Portland and Puget Sound. This was

thirty-eight years afterward. No question can be raised as to the respect which this Court should pay to a long-continued construction necessarily placed upon doubtful language by the executive departments in the course of their administration. Their experiences and contacts with the subject-matter give valuable assistance. No such considerations apply to isolated decisions by the Assistant Secretary, who has no facilities superior to those of the court to determine the question at hand. It was not until 1906 that the General Land Office had laid down second indemnity limits along this line (R. 517). The Assistant Secretary in his opinion does not indicate that he reaches his conclusion on any basis except construction of the language in the Act itself as to which he is in no better position to judge than this Court. *Haggar Co.* v. *Helvering*, 308 No. 176, 1939 Term. He recognizes in his opinion the unreasonableness of granting second indemnity limits along a line which had received no land grant before, but he felt constrained to reach the unreasonable result by the language of the resolution. He seems not to have had before him the debates in Congress. He treats the resolution as if it gave a second indemnity grant for the main line of the railroad (p. 276), wherever that line might be, and entirely disregarded the words "within the limits prescribed by its charter." Under his decision no significance attaches to those words. They define nothing not

fully defined by the preceding words, "the amount of lands per mile granted by Congress to said company," by the Act of July 2, 1864.

The meaning of the second indemnity provision had been in debate for some time before but not on the question of its applicability to the Portland-Tacoma line. On January 17, 1888, Attorney General Garland, 8 L. D. 14, advised Secretary Vilas that the Resolution of May 31, 1870, did create a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864. The opinion does not deal with the question whether or not the belt extends along the line from Tacoma to Portland. On October 17, 1888, Judge, later Mr. Justice, Brewer in *Northern Pac. R. Co. v. United States,* 36 Fed. 282, decided to the same effect. This opinion does not deal with the question now under discussion.

It is submitted that the second indemnity belt provided by the Resolution of May 31, 1870, was to make up for losses to the Railroad Company of lands "within the limits prescribed by its charter" of July 2, 1864, and none others.

3. This portion of the railroad has never been completed into the main line contemplated by the resolution and therefore the company never acquired a right to make these indemnity selections

The argument that the company has no rights of indemnity selection, after failure to complete the

whole road, applies with particular emphasis to the portion of the railroad between Portland and Tacoma.

It was not until 1906 that the Land Department laid down second indemnity limits opposite the road between Portland and Tacoma (R. 517). By that time it had become clear that the company was not going to complete that road as a part of the main line but that it was to remain a branch line only. Hence there was no authority to establish these indemnity limits.

Such a branch was first authorized by the Resolution of April 10, 1869, 16 Stat. 57 (App. 56), which contained a proviso that the company should not be entitled, outside of the right-of-way, to any land subsidy in respect of such branch.

When the line from Tacoma to Portland was finally located, both this Resolution and the Resolution of May 31, 1870, were in effect.

It does not appear that either the Resolution of 1869 or that of 1870 was formally accepted. But the company recognized the resolution as an effective amendment of its charter (H. Misc. Doc. No. 228, 42d Cong., 2d sess. (1872), pp. 1–8, 28). No acceptance was necessary. Both Resolutions were enlarged grants beneficial to the company.

The Resolution of 1870 did not supersede that of 1869.

It remains true today that for a branch line from Tacoma to Portland, the company was to receive no land subsidy outside its right-of-way.

When the Act of June 25, 1929, c. 41, 46 Stat. 41 (App. 148), with its forfeiture clause went into effect there had never been any action by Congress indicating an intention to recede from the position that for a branch line only, from Tacoma to Portland, the company should have no land grant outside its right-of-way.

The appeal before the Court does not seek the forfeiture of any title to any place lands or to any other patented lands. As to the matter now discussed, it rests on the foundation that as the company had not performed the condition expressed in section 8 of the Act of July 2, 1864 (13 Stat. 365, App. 47) that it complete the whole railroad via the valley of the Columbia River to Puget Sound, it never has perfected its right to make selections from indemnity limits now in the forest reserves.

As to the part of the railroad from Tacoma to Portland, emphasis is added by the proviso of the Resolution of April 10, 1869, that, outside the right-of-way, the company is to have no land grant for a branch line.

Although this part of the railroad was built ostensibly as a sector of the main line, it has turned out to be only a branch. Whatever the company receives and retains as a grant opposite that part

of the road is beyond anything that Congress intended for a branch line.

The definite locations for this part of the line were filed, the first on May 14, 1874, and the last on September 22, 1882 (R. 616, para. (a) and (d), 603.) At those times the company was representing this part to be a sector of the main line. It is so recited in the mortgage of July 1, 1870 (Ex. E of the bill of complaint, not printed in the Supreme Court) and in 1882 in its contract with the Oregon Railway & Navigation Company (N. P. Ex. 71, R. 722) the company states that it "intends to continue the construction of said main line down the valley of the Columbia River", meaning the sector from Wallula to Portland which was never built.

The action of the United States in issuing patents for lands opposite the line from Portland to Tacoma, was based on the representation of the company that this was part of the main line to be. It did not betoken any intention to grant land subsidies for a branch line between Tacoma and Portland.

By such a representation, the company should not be permitted to circumvent the proviso of the Resolution of April 10, 1869, against a subsidy for a branch line, and so both to keep the place lands already received and to get compensation in addition for lands never received or earned.

The compensation awarded to the company by the decree of June 27, 1939, to the extent of 155,727.84 acres (R. 644) is for indemnity selections

forfeited by the Act of June 25, 1929, opposite the line from Tacoma to Portland. At the time, these lands were withdrawn for the reserves of the United States, the company had no right to make any such selections, because it had not performed the condition to complete the whole railroad.

CONCLUSION

It is submitted that the decree of June 27, 1939, of the district court should be reversed with costs to the United States in the respects and for the reasons hereinbefore stated and that the decree should be affirmed to the extent that it denies to the Northern Pacific Railway Company compensation for withdrawals from what it claims to be the second indemnity limits under the Resolution of May 31, 1870, opposite the railroad from Portland to Tacoma and to the extent that it awards other relief to the United States.

Respectfully submitted.

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